Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Edgerton Sand & Gravel, Inc.,
Plaintiff-Respondent-Petitioner,

v.

General Casualty Company of Wisconsin
and Aetna Casualty and Surety Company,
Defendants-Appellants-Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI AND APPENDICES TO THE PETITION

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143 pp

QUESTIONS PRESENTED

1. Is the Due Process Clause of the Fourteenth Amendment violated when a state supreme court justice casts the deciding vote in a case raising an important question of state law, where the justice owns shares of stock in, and the justice's spouse is employed as a staff attorney by, an *amicus curiae* that had represented to the state supreme court that it is vitally interested in the outcome of the case?

2. Does the "voluntary, knowing, and intelligent" test for waiver of fundamental constitutional rights in criminal cases apply equally in the civil context?

PARTIES IN THE PROCEEDING

Pursuant to Rule 29.1, Petitioner discloses that this petition is filed by Edgerton Sand & Gravel, Inc., a Wisconsin corporation. Edgerton Sand & Gravel, Inc. was a plaintiff in the complaint and a respondent before the Supreme Court of Wisconsin. Related companies to Edgerton Sand & Gravel, Inc. are Administrative Services, Inc., a Wisconsin corporation, Edgerton Crushing, Inc., a Wisconsin corporation, and Edgerton Readi-Mix Concrete Co., a Wisconsin partnership.

The respondents are General Casualty Company of Wisconsin and Aetna Casualty & Surety Company. The respondents are insurance corporations that were named as defendants in the complaint and were appellants before the Supreme Court of Wisconsin.

City of Edgerton, Wisconsin was a plaintiff in the complaint and was a respondent before the Supreme Court of Wisconsin. Wisconsin Insurance Security Fund, Hanover Insurance Company, Wausau Insurance Companies and Local Government Property Insurance Fund were defendants in the complaint.

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Edgerton Sand & Gravel, Inc.,
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On Petition for a Writ of Certiorari to the
Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI

Edgerton Sand & Gravel, Inc. hereby respectfully requests the Court to issue a Writ of Certiorari to review the decision of the Supreme Court of Wisconsin on the Motion to Vacate Decision or Alternatively to Rehear Without Participation of Challenged Justice, entered in this case on February 23, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin on the Motion to Vacate Decision or Alternatively to Rehear Without Participation of Challenged Justice, filed February 23, 1995, reproduced in the Appendix (hereafter "App.") at 101, is reported at 190 Wis. 2d 510, 527 N.W.2d 305 (Wis. 1995). The opinion of the Supreme Court of Wisconsin on the substantive question of insurance coverage law presented below is reported at 184 Wis. 2d 750, 517 N.W.2d 463 (Wis. 1994), and is reprinted in the Appendix at App. 116. The opinion of the Wisconsin Court of Appeals is reported at 172 Wis. 2d 518, 493 N.W.2d 768 (Wis. App. 1992), and is reprinted in the Appendix at App. 163. The unreported decision of the Circuit Court for Rock County, Wisconsin, dated May 10, 1991, is reprinted in the Appendix at App. 207.

JURISDICTION

The Supreme Court of Wisconsin issued its opinion on the Motion to Vacate Decision or Alternatively to Rehear Without Participation of Challenged Justice on February 23,

1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE[1]

I. THE ST. PAUL COMPANIES REPRESENTED TO THE SUPREME COURT OF WISCONSIN THAT THEY WERE VITALLY INTERESTED IN THE OUTCOME OF THE PROCEEDING BELOW IN THE PRESENT CASE

This case arises from a declaratory judgment action that Edgerton Sand & Gravel, Inc. ("Petitioner") and one

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[1] This Petition refers to the pertinent pleadings filed in the proceeding below before the Supreme Court of Wisconsin as follows: (a) Brief and Addendum of *Amici Curiae* Wisconsin Insurance Alliance and Insurance Environmental Litigation Association in Support of Petition for Review (filed Jan. 12, 1993) ("ILEA Br."); (b) Motion of Wisconsin Insurance Alliance and Insurance Environmental Litigation Association for Leave to File Brief as *Amici Curiae* in Support of Petition for Review (filed Jan. 12, 1993) ("ILEA Mtn."); (c) Brief of Edgerton Sand & Gravel, Inc. in Support of Motion to Vacate the Court's Decision in This Appeal or, in the Alternative, to Rehear the Case Without the Participation of Justice Janine P. Geske (filed Nov. 28, 1994) ("Edgerton Br.").

other party filed to obtain liability insurance coverage for the costs of complying with government orders that required Petitioner and other responsible parties to clean up environmental contamination at a landfill in Edgerton, Wisconsin. The trial court ruled that Petitioner's insurers, General Casualty Company of Wisconsin and Aetna Casualty & Surety Company, covered those environmental remediation costs. App. 207. The Wisconsin Court of Appeals affirmed. App. 163.

The Supreme Court of Wisconsin granted review to decide (a) whether the costs of complying with environmental remediation orders are "damages" that could be covered by standard form liability insurance policies, and (b) whether administrative environmental remediation proceedings are "suits" that could trigger the duty to defend under standard form liability insurance policies. App. 118-19.

Those issues are of enormous financial significance to the insurance industry. A recent study estimated that domestic insurers are likely to end up paying $214 billion to fund environmental remediation costs in the United States. *See* Russ Banham, *Superfund Reform Groups*, 1 Lloyd's Environmental Risk International 3-4 (May 1993) (citing to a study by the Tillinghast consulting firm); *see also* ILEA Br. 5 (the total environmental cleanup costs in the United States, including costs not covered by insurance, have "been reliably estimated to be at least $500 billion"). While the precise percentage of that amount that would apply to Wisconsin claims is uncertain, insurance industry *amici curiae* in this case told the court below that it can cost tens

or even hundreds of millions of dollars to clean up a single contaminated site. ILEA Br. 3. If environmental remediation proceedings are not "suits" for "damages," standard form liability insurance policies would not cover those costs. App. 121.

Because of the substantial liabilities at stake, the Supreme Court of Wisconsin's deliberations on these two issues generated great interest in the insurance industry. The Insurance Environmental Litigation Association ("IELA") -- "a trade association of national property and casualty insurers formed, in part, to represent its members' positions in environmentally-related insurance coverage cases" (ILEA Br. 1) -- was granted leave to file a brief *amici curiae* "on behalf of" eighteen specified insurance companies urging reversal of the Wisconsin Court of Appeals decision. ILEA Mtn. 2 n.2.

Among the insurers on whose behalf IELA filed its *amicus* brief were the St. Paul Companies ("St. Paul"). *Id.* ILEA told the Supreme Court of Wisconsin that the "member companies on whose behalf this submission is made" -- including St. Paul -- "have substantial, independent interests in the questions presented" in this case. *Id.* at 3.

Indeed, IELA stated that the interest of each IELA member in the outcome of this case was not just "substantial," but also was "vital[]":

> The member companies of . . . IELA have issued to a great many insureds, in Wisconsin and elsewhere, insurance policies containing

> provisions identical or similar to those at issue here. Accordingly, they are vitally interested in the judicial interpretation of those provisions. . . . [Indeed, t]his is no ordinary case, in view of the number of important first-impression issues involved and the potential financial impact of the Court's decision on environmental cleanups estimated to cost hundreds of billions of dollars.

Id. at 3-4.

II. SUPREME COURT OF WISCONSIN JUSTICE GESKE DID NOT FULLY DISCLOSE TO PETITIONER THAT SHE HAD A SUBSTANTIAL FINANCIAL AND PERSONAL INTEREST IN THE ST. PAUL COMPANIES

At the commencement of oral argument in this case before the Supreme Court of Wisconsin on November 29, 1993, Justice Janine P. Geske made the following disclosure in open court to the attorneys for Petitioner and the other parties:

> I . . . want to make a disclosure. Last night when I was looking one more time at the *amicus* briefs, I noted that Mr. Burell had filed an *amicus* brief on behalf of the Insurance Environmental Litigation Association, and I looked at the appendix and I noted that one of the companies listed in that is St. Paul Companies. My husband is

> employed by that company. I do not believe that it presents any conflict and will not influence me. If anybody has any objections to me [sic] sitting on this case, I would appreciate hearing from you in [sic] letter by the end of the week. Thank you.

App. 105-06.

Although Wisconsin law requires a judge to make a "full and complete disclosure on the record of the factors creating" a potential conflict of interest, Wis. Stat. § 757.19(3), Justice Geske's disclosure at the hearing in fact was incomplete.

First, Justice Geske failed to disclose that her husband, Michael J. Hogan, is more than a mere employee of St. Paul. He is a staff attorney for St. Paul, practicing in Milwaukee, who represents St. Paul in insurance coverage litigation that determines whether St. Paul is liable for defense and indemnification costs incurred by its insureds. Edgerton Br. 4. Similar issues were involved in the present case. App. 118-121, 128-162.

Second, Justice Geske did not disclose at the hearing that she had an interest in excess of $50,000 in the St. Paul savings plan, which consists of St. Paul stock and mutual funds, as well as a financial interest in a St. Paul retirement plan. To be sure, Justice Geske disclosed this information in a Statement of Economic Interests that she filed with the State of Wisconsin Ethics Board. App. 109-10 (referring to Justice Geske's December 14, 1993 disclosure); Edgerton

Br., Addendum B (copy of disclosure form).[2] However, Justice Geske did not, at the time of the hearing (App. 105-06), or thereafter, direct the attention of the parties in this case to this filing.

Based on the information provided to it at the hearing before the Supreme Court of Wisconsin, Petitioner did not object within a week to Justice Geske's participation in the case. App. 106. Subsequent to the Supreme Court of Wisconsin's decision on the merits of the insurance coverage questions, Petitioner learned of Justice Geske's financial interest in St. Paul and that Justice Geske's husband was a staff attorney for St. Paul.[3]

III. THE DECISIONS BELOW

On June 16, 1994, the Supreme Court of Wisconsin issued its decision on the merits of the insurance coverage questions in this case. Justice Geske wrote the opinion for the four-to-three majority. All but one of the other highest

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[2] The disclosure form has two categories for financial information: "Value $50,000 or Less" and "Value More Than $50,000." Edgerton Br., Addendum B. Thus Justice Geske's holdings may well be far in excess of $50,000.

[3] *See* App. 104-05, 108 (on September 2, 1994, while Petitioner's motion to the Wisconsin Supreme Court for reconsideration of its decision on the merits was pending, three *non-parties* to this case sought leave to file a motion for recusal of Justice Geske and submitted evidence of her interest in the St. Paul Companies, but the Wisconsin Supreme Court declined to grant those non-parties leave to file their motion).

state courts to address these questions had ruled that an environmental remediation proceeding is a "suit" that seeks "damages" as those terms are used in standard form comprehensive general liability insurance policies. The Supreme Court of Wisconsin majority concluded, however, that an administrative environmental remediation proceeding is not a "suit" and that the costs incurred to remediate environmental contamination are not "damages." App. 121. The three dissenters argued that the decision of Wisconsin Court of Appeals in favor of Petitioner should have been affirmed. App. 155-62.

On October 25, 1995, the Supreme Court of Wisconsin denied Petitioner's motion for reconsideration. App. 115. Petitioner and one other party filed a petition for writ of certiorari before this Court to seek review of the Supreme Court of Wisconsin's June 16, 1994 decision on the "suit" and "damages" issues; however, by order dated March 20, 1995, this Court declined to grant the petition.

In the meantime, on November 28, 1994, Petitioner filed a motion to vacate the Supreme Court of Wisconsin's decision, or, in the alternative, for rehearing of the case without the participation of Justice Geske ("Motion to Vacate"). In the brief in support of the Motion to Vacate, Petitioner argued, *inter alia*, that Justice Geske's failure to recuse herself and to disclose fully at the hearing her financial interest in the outcome of the case violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Edgerton Br. 12-14.

On February 23, 1995, the Supreme Court of Wisconsin dismissed Petitioner's Motion to Vacate.[4] The court stated initially that Petitioner had waived its right to an impartial decisionmaker because Petitioner did not request Justice Geske to recuse herself during the week after the November 29, 1993 hearing. App. 102, 108 110. The court indicated that Petitioner had a duty to conduct an investigation before the end of the week of the November 29, 1993 hearing to determine whether Justice Geske had financial ties to St. Paul. App. 107. The court noted that "at least since . . . December 14, 1993," Justice Geske had disclosed her holdings in St. Paul stocks and mutual funds and that her husband was an attorney-employee of St. Paul. App. 109. The court also referred to Petitioner's delay in filing the Motion to Vacate until November 1994, after the court had ruled on the motion for reconsideration, and to Petitioner's failure to join in a proposed motion for vacation or rehearing without the participation of Justice Geske that three non-parties unsuccessfully sought leave to file with the court in September 1994, while the motion for reconsideration was pending. App. 103-04, 108.

But the court concluded that it would entertain the Motion to Vacate. The court explained that, although the

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[4] In its decision, the court did not distinguish between Petitioner's right to an impartial decisionmaker under the Wisconsin recusal statute and Petitioner's right to an impartial decisionmaker under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Because the federal question was expressly raised in the Motion to Vacate, the Supreme Court of Wisconsin necessarily determined the federal question.

ordinary rule under Wisconsin law is that the court would not exercise jurisdiction after remittitur of a judgment, that rule is inapplicable in cases where a judge is disqualified from participating in a decision. App. 103 (citing *American TV and Appliance of Madison, Inc.*, 151 Wis. 2d 175, 181, 443 N.W.2d 662, 664 (1989)). Under Wisconsin law, where a judge is disqualified from participating in a case, the court's decision is void, and may be expunged by the court "at any time," notwithstanding "statutory requirements for reopening, appealing from, or modifying orders or judgments." *Id.*; *accord State v. Marhal*, 172 Wis. 2d 491, 493 N.W.2d 758 (Wis. App. 1992), *review denied*, __ Wis. 2d __, 497 N.W.2d 131 (1993) (although defendant "waived his direct challenge to the impartiality of the sentencing trial judge by not seeking her recusal . . . the sentencing *must* nevertheless be vacated if the trial judge should have recused herself *sua sponte*") (emphasis added).

The court then decided to exercise its jurisdiction and reached the merits of the challenge to the appearance of Justice Geske's impartiality. App. 102-03, 104, 108-09, 111.[5] The court ruled that Justice Geske had properly

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[5] Although the court stated at one point that "we could, and do, base [our determination of the motion] on the fact that there has been one reconsideration of the court's decision and we will not entertain a request for a second," App. 108 (citing *Blau v. City of Milwaukee*, 232 Wis. 197, 208, 285 N.W. 347, 286 N.W. 874, 287 N.W. 594 (1939)), the remainder of the court's order states that the court chose *not* to exercise the option to refuse to entertain a second motion for reconsideration, and considered Petitioner's claim "on the merits." App. 112; *see also* App. 105, 108-09, 111. Moreover, Petitioner sought, in the alternative, to vacate the decision. Under Wisconsin law such a

participated in the decision, because (a) St. Paul was an *amicus*, not a party, and (b) Justice Geske had made a subjective determination that she would be impartial in the case. App. 109-11.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS NEVER CONSIDERED WHETHER THE DUE PROCESS CLAUSE REQUIRES THE RECUSAL OF A JUDGE WHEN THE JUDGE HAS A SUBSTANTIAL PECUNIARY AND PERSONAL INTEREST IN AN *AMICUS CURIAE* THAT HAS REPRESENTED TO THE COURT THAT IT IS VITALLY INTERESTED IN THE OUTCOME OF THE CASE

Almost seventy years ago, this Court held that "it certainly violates the Fourteenth Amendment . . . to subject [a person's] . . . liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also id.* at 512 (ruling unconstitutional an Ohio law under which a mayor, sitting as a court of justice, received a fee if the

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motion could be made at any time when the asserted ground was the disqualification of a Justice. *See* App. 111. Thus, the discussion in the decision below of the waiver of the right to file a motion to reconsider does not apply to Petitioner's Motion to Vacate. The court below therefore did not rely upon an independent and adequate state law ground for its decision.

defendant was convicted, but not if the defendant was acquitted); *In re Murchison*, 349 U.S. 133, 136 (1955) (the "situation [in which recusal is mandatory] is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'") (citation omitted).

A later decision amplifying the *Tumey* standard, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), is particularly apt. In that case, an arbitrator had occasionally acted in the past as a paid consultant to one of the parties to the arbitration, and had received $12,000 in fees from the party over several years. *Id.* at 146. This Court held that the arbitrator's interest required disqualification, noting that, were the arbitrator a judge, disqualification would be constitutionally mandated. *Id.* at 148.

This Court has also held that a judge may have a "direct, personal, substantial, [and] pecuniary" interest in the *outcome* of a lawsuit, such that the judge's participation in a proceeding violates the Due Process Clause, even though the judge has no interest in any of the *parties* to the lawsuit. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986). In the proceeding underlying *Lavoie*, the Alabama Supreme Court had recognized, by a five-to-four vote, a new type of insurance "bad faith" claim. Justice Embry, the author of the Alabama Supreme Court's majority opinion (*id.* at 818), had filed a separate lawsuit in the Alabama state courts in which he alleged a similar "bad faith" claim. After the Alabama Supreme Court issued its opinion, Justice Embry settled his bad faith case for $30,000. *Id.* at 818-19.

Aetna Life Insurance -- the losing party before the Alabama Supreme Court -- argued that its Due Process rights were violated because Justice Embry cast the deciding vote in the Alabama Supreme Court decision.

This Court agreed, vacated the Alabama Supreme Court decision, and remanded the case for further proceedings in which Justice Embry would not participate. *Id.* at 828. In concluding that Aetna's due process rights were violated, this Court examined several "factors [that] might constitute such an interest in the outcome of th[e] case that would bear on recusal." *Id.* at 822. In particular, the Court noted that: (a) Justice Embry had a financial interest in the outcome of the case because he had a similar claim pending in an Alabama state court; (b) the Alabama Supreme Court's decision would be binding on all Alabama state courts; (c) the law on the "bad faith" issue was unsettled in Alabama; and (d) "[w]hen Justice Embry cast the deciding vote, he did not merely apply well-established law and in fact quite possibly made new law . . . ." *Id.*

Although the precise contours of the "direct, personal, substantial, [and] pecuniary" test have never been defined with precision, *see Murchison*, 349 U.S. at 136, the line of authority from *Tumey* to *Lavoie* squarely places Judge Geske's interest in this case in the impermissible zone.

There is no question that the Due Process Clause would have required Justice Geske to recuse herself from participating in the case below if St. Paul had been a party. Justice Geske had a direct and substantial interest in St. Paul, through her ownership of more than $50,000 in St.

Paul stock and other securities in the St. Paul savings plan, her interest in the St. Paul retirement plan, and her husband's employment by St. Paul as an insurance coverage attorney.[6] Indeed, Justice Geske recused herself in the two cases during her tenure on the Supreme Court of Wisconsin in which St. Paul was a party. *Castaneda v. Pederson, and St. Paul Fire & Marine Insurance Co.*, 185 Wis. 2d 200, 518 N.W.2d 246 (1994), and *Jelinek v. St. Paul Fire & Casualty Insurance Co.*, 182 Wis. 2d 1, 512 N.W.2d 764 (1994). Thus she implicitly acknowledged a significant financial or personal stake in cases in which St. Paul is a party.[7]

The due process concerns that require recusal if the judge has a substantial financial or personal interest in a party apply equally to an *amicus curiae* such as St. Paul -- at least under the circumstances at issue here, where the *amicus curiae* represented that it is "vitally interested" in the outcome of the case, and brought to the attention of the court the significant financial impact the court's ruling was likely

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[6] Wisconsin is a "community property" state. Wis. Stat. §§ 766.31 et seq. Thus, that Justice Geske's husband -- rather than Justice Geske herself -- is a St. Paul employee does not matter for present purposes: a portion of the Geske/Hogan family income is derived from St. Paul. *See generally Headwaters, Inc. v. Bureau of Land Management*, 665 F. Supp. 873, 874 (D. Or. 1987) (recusal is appropriate where the judge's spouse was a shareholder in a company that would obtain a financial benefit from the outcome of the case).

[7] Apart from the requirements of due process, Wisconsin law requires recusal where the judge "has a significant financial or personal interest in the matter." Wis. Stat. § 757.19(2).

to have on it. Here, St. Paul represented to the Supreme Court of Wisconsin that its interest was "substantial" and "independent" of the other insurers joining the IELA brief (ILEA Mtn. 3),[8] and pointed to the "potential financial impact" of the Supreme Court of Wisconsin's decision on claims for insurance coverage for "environmental cleanups estimated to cost hundreds of billions of dollars." *Id.* at 4. That is precisely the situation that "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *In re Murchison*, 349 U.S. at 136.

Lavoie indicates that Due Process concerns extend beyond the situation where the judge has an interest in a party. Under the same factors that this Court applied in *Lavoie*, 475 U.S. at 812, Justice Geske's participation denied Petitioner due process. Justice Geske (a) had an interest in the outcome of the case because she had a financial and personal interest in an *amicus curiae* that had an "independent," "substantial" and "vital[]" "interest" in the

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[8] A computer search revealed that St. Paul has been a party to more than 100 reported decisions involving insurance coverage for the types of environmental remediation claims that are affected by the Wisconsin Supreme Court's decision in this appeal, including the recent decision in *Patz v. St. Paul Fire & Marine Insurance Co.*, 15 F.3d 699 (7th Cir. 1994) (applying Wisconsin law). Most pertinently, St. Paul issued liability insurance policies to several parties that are potentially responsible for the cleanup of the Edgerton landfill. After the Wisconsin Supreme Court decision was issued, St. Paul denied insurance coverage for at least two potentially responsible parties at the site, and will probably not be liable for the costs incurred by those parties at the site. Edgerton Br., Addenda D-F.

outcome of this case; (b) the Supreme Court of Wisconsin's decision would be binding on all Wisconsin state courts; (c) the law on the issues presented below was unsettled in Wisconsin (ILEA Mtn. 3); and (d) when Justice Geske cast the deciding vote, she "did not merely apply well-established law and in fact quite possibly made new law . . . ." 475 U.S. at 822; *see* App. 118.

With the large number of amici curiae briefs that are filed every year, the issue raised in this Petition will arise in other cases. But no case of which Petitioner is aware has squarely addressed whether due process precludes a judge from casting the deciding vote in a case where the judge has a financial or personal interest in an *amicus curiae* that will benefit directly from the outcome of the case.[9] Because of the huge financial impact of the decision below on insurance policyholders in Wisconsin, and the serious due process concerns that arise from Justice Geske's participation in that decision, Petitioner respectfully requests the Court to grant its petition in this case.

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[9] *Cf. Bernard v. Bernard*, 31 F.3d 842, 844-45 (9th Cir. 1994) (a judge married to United States Trustee concludes that he should recuse himself in any case in which the United States Trustee appears as an amicus, citing to the views of the Committee on Codes of Conduct); *see also In re Honolulu Consolidated Oil Co.*, 243 F. 348 (9th Cir. 1917) (a judge should recuse himself under the federal recusal statute where the judge is a stockholder in a corporation with a pending lawsuit that will be affected by the case pending before him). The policy goal of the federal recusal statute, 28 U.S.C. § 455, -- the avoidance of the appearance of judicial impropriety -- is of "constitutional dimensions." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 & n.12 (1988) (citing *Lavoie*, *Tumey*, and *Murchison*).

II. THIS COURT HAS NEVER CONSIDERED WHETHER THE "VOLUNTARY, KNOWING, AND INTELLIGENT" TEST FOR WAIVER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS APPLIES EQUALLY IN THE CIVIL AS IN THE CRIMINAL CONTEXT

This Court has stated, in the criminal context, that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970) (internal citations omitted). In *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1971), a civil case, this Court assumed, without deciding, that the *Brady* standard applies to the contractual waiver of due process rights in the civil context. *Id.* at 185.

Overmyer involved the exercise of a provision of Ohio law whereby one party may consent in advance to a default judgment without notice or hearing. In a decision narrowly confined to the facts of the case, *id.* at 178, 188, the Court determined that the petitioner had voluntarily, knowingly, and intelligently waived its constitutional right to notice and a hearing. *Id.* at 187.

This case presents this Court with an opportunity to decide the question not reached in *Overmyer* -- whether the "voluntary, knowing, and intelligent" standard applies in to the waiver of a fundamental due process right in the civil context. Unlike *Overmyer*, this case presents a situation in which a "voluntary, knowing, and intelligent" waiver did not

occur. At least two federal Courts of Appeal have determined a purported waiver of fundamental constitutional rights in civil cases to be invalid where it was not voluntary, knowing, and intelligent.[10] At least implicitly, the decision of the Supreme Court of Wisconsin in this case is to the contrary.

The reasoning of *Brady* and its predecessors should be just as compelling in the civil as in the criminal context. To deny parties their fundamental constitutional rights on the basis of anything less than a voluntary, knowing, and intelligent waiver would invite erosion of due process rights through a variety of technical defaults. Particularly in the present case, where the due process right at issue is designed to uphold the public's confidence in the judiciary, to adopt a lower standard for waiver would only tend to diminish the judiciary, and indeed the legal system, in the eyes of the public.

Determining whether a particular alleged waiver was indeed voluntary, knowing, and intelligent may depend in part on the particular circumstances of the case. *Brookhart*

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[10] *See Gonzalez v. County of Hidalgo, Texas*, 489 F.2d 1043, 1048-50 (5th Cir. 1973); *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 693 (6th Cir. 1981) (Opinion of Celebrezze, J.) (waiver invalid because not knowing); *id.* at 695-696 (Opinion of Merritt, J.) (waiver was invalid because not voluntary); *cf. Bond v. Dentzer*, 494 F.2d 302, 312-14 (2d Cir. 1974), *cert. denied*, 419 U.S. 837 (Kaufman, J., dissenting) (the device of wage assignment denies debtor the due process right to have the question of default adjudicated, and an adhesion contract clause did not constitute a constitutionally valid waiver of that right).

v. Jones, 384 U.S. 1, 4 (1966). There is a presumption against such a waiver. *Id.* Whether the waiving party was an uncounselled criminal defendant or a sophisticated, counselled corporation is of course a relevant factor to be considered. *See, e.g., Overmyer*, 405 U.S. at 186. Ultimately, when a court determines that a constitutional right has been waived, it is deciding a question of federal constitutional law. *Brookhart*, 384 U.S. at 4 & n.4.

In the proceeding below, Petition did not voluntarily, knowingly, and intelligently waive its constitutional right to an unbiased decisionmaker.

Justice Geske gave Petitioner a week within which to request her to recuse herself from hearing this case. But she did not give Petitioner sufficient information to make an informed waiver of Petitioner's due process rights. Justice Geske merely told Petitioner that her husband, Michael Hogan, worked for St. Paul. For all Petitioner knew, Mr. Hogan could have worked in St. Paul's employee relations department or as a bookkeeper or a life insurance agent. Nothing in Justice Geske's statement suggested that Mr. Hogan was an attorney who represented St. Paul in insurance coverage matters. Nor did Justice Geske suggest or even hint at the hearing that she had an interest in excess of $50,000 in the St. Paul savings plan, which included holdings of St. Paul stock, as well as a holding in the St. Paul pension plan.

To the extent that the Supreme Court of Wisconsin held that Petitioner had an affirmative obligation to conduct an independent investigation of government records to

determine whether Justice Geske had a personal or financial interest that would warrant a request for disqualification, App. 107, 111, the court was in error. That holding substitutes a "due diligence" requirement for the "voluntary, knowing, and intelligent" standard set forth in decades of this Court's decisions.

Waiver of a litigant's right to a fair and impartial judge should not be determined on the ground that a litigant might have performed a Dun & Bradstreet search, or scoured the public records, in order to determine whether a judge should be disqualified from sitting on a case. Rather, a party should be deemed to have waived its fundamental constitutional rights only if the judge had fully disclosed, on the record and at the time of the purported waiver, the disqualifying circumstances.[11] No such disclosure was made below.[12]

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[11] Indeed, by statute in Wisconsin, Wis. Stat. § 757.19(3), disqualification of a judge may be waived only "by agreement of all parties and the judge after full and complete disclosure on the record of the factors creating such disqualification." *See also United States v. Nobel*, 696 F.2d 231, 237 & n.11 (3d Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983) (under the federal Code of Judicial Conduct, full disclosure must be made "at a time early enough to form the basis of a timely motion at or before trial and under circumstances which avoid any subtle coercion").

[12] Of course, a state may set reasonable procedural requirements for the assertion of a constitutional right, and the failure of a party to comply with those requirements may constitute a waiver of that right. *Yakus v. United States*, 321 U.S. 414, 444 (1944). But here, the Supreme Court of Wisconsin determined that a litigant may assert such rights at any time, even after a case is decided and the matter is

Furthermore, while litigants may be entitled to waive fundamental constitutional rights that affect them personally, when the assertion of those rights affects society as a whole, waiver may be inappropriate. Most pertinently, the decision below affects the interests of thousands of insurance policyholders in Wisconsin that were not represented in the courtroom.[13] Obviously, those persons and businesses were not asked to waive Justice Geske's conflict of interest. It is inconsistent with the fair and impartial administration of justice for a judge with a substantial financial or personal interest in the outcome of the case that affects the public generally to cast the deciding vote in that case. Rather, in those circumstances, the right to an impartial decisionmaker should be mandatory, not waivable.

This Court should grant the petition for writ of certiorari to decide (a) whether a party may waive its due process rights to require disqualification of a judge with a personal or financial interest in the outcome of a case that affects both the party and other persons or entities not parties to the case, and (b) if so, whether such a waiver must be "voluntary, knowing, and intelligent."

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remanded to the lower courts. App. 103; *see also Barker v. Wingo*, 407 U.S. 514, 527 (1972) ("Courts should 'indulge every reasonable presumption against waiver,' . . . and they should 'not presume acquiescence in the loss of fundamental rights.'") (citing *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and *Ohio Bell Tel. Co. v. Comm'n*, 301 U.S. 292, 307 (1937)).

[13] More than 100 Wisconsin businesses and government entities joined in briefs *amicus curiae* in support of Petitioner's motion for reconsideration of the Supreme Court of Wisconsin's decision.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Edgerton Sand & Gravel, Inc.

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Edgerton Sand & Gravel, Inc.,
Plaintiff-Respondent-Petitioner,

v.

General Casualty Company of Wisconsin
and Aetna Casualty and Surety Company,
Defendants-Appellants-Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Wisconsin

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

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STATE OF WISCONSIN : IN SUPREME COURT

No. 91-1408

City of Edgerton and
Edgerton Sand & Gravel, Inc.,

Plaintiffs-Respondents,

v.

General Casualty Company
of Wisconsin,

Defendant-Appellant-Petitioner,

Wisconsin Insurance Security Fund,

Defendant,

Aetna Casualty and Surety Company,

Defendant-Co-Appellant-Petitioner,

Hanover Insurance Companies,
Wausau Insurance Companies and
Local Government Property Insurance Fund,

Defendants.

ON MOTION TO VACATE DECISION OR ALTERNATIVELY TO REHEAR WITHOUT PARTICIPATION OF CHALLENGED JUSTICE.

Motion dismissed.

Decided Feb. 23, 1995.

HEFFERNAN, CHIEF JUSTICE. We dismiss the motion of Edgerton Sand & Gravel, Inc. (ES&G) to vacate this court's decision of June 16, 1994, 184 Wis.2d 750, 517 N.W.2d 463 or, alternatively, for a rehearing in the matter. To the extent the motion seeks a second reconsideration, this court does not reconsider denials of reconsiderations. In addition, the motion must be dismissed because we conclude that the movant, ES&G, on multiple occasions, waived whatever objections it might have had to the participation of one of the justices in the court's decision.

Nevertheless, because the movant has questioned the integrity of a justice of this court and hence the integrity of a decision of the court, we address the movant's claim and conclude that the motion of ES&G is meritless.[1] The court does not ordinarily exercise any jurisdiction after the remittitur of the judgment, opinion and the record to the

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[1] It should be noted that on the date the instant motion was filed, the movant submitted a copy of a consent to the substitution of ES & G's president, who is a member of the Wisconsin bar, for the attorneys who had appeared on its behalf in the review and on the motion for reconsideration. That consent was directed to the circuit court in which the underlying action originated. The instant motion was filed by ES & G's substituted counsel.

circuit court. Ott v. Boring, 131 Wis. 472, 110 N.W. 824 (1907). However, this court has held that the Ott rule is inapplicable when it is asserted, as here, that the court's decision is void because a justice should not have participated in the case. State v. American TV & Appliance, 151 Wis.2d 175, 181, 443 N.W.2d 662 (1989). It behooves the court in the defense of its own legitimacy and of its integrity to consider such claims.

The movant, ES&G, was a plaintiff in the action seeking a declaration that it was afforded insurance coverage for the defense of administrative proceedings it considered to be the equivalent of a suit at law. By decision of June 16, 1994, a divided court (four-three) held against the plaintiffs, the author of this opinion on the motion for vacatur or rehearing being one of the minority.

On July 5, 1994, ES&G moved for reconsideration, contending that the court had misapprehended controlling law. The motion was based on the assertion that the court's decision was contrary to the intent of the United States Congress as determined by a recent decision of the United States Supreme Court, Key Tronic Corp. v. The United States, --- U.S. ----, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994). ES&G also claimed that this court erred when it concluded that, under the terms of its insurance policy, the administrative proceedings involving ES&G were not reasonably to be construed as synonymous with a "suit."

Those legal assertions and a request to supplement the record were the sole bases for ES&G's reconsideration motion, notwithstanding that Kenosha Auto Transport (KAT) and two others, who had sought amicus status in the

reconsideration, requested permission to file a motion and brief asking that the decision be vacated or that Justice Janine P. Geske be disqualified from the reconsideration. Although KAT's proposed motion and brief had been served on all parties, including ES&G, neither ES&G nor any other party joined in KAT's challenge or asserted Justice Geske's disqualification as ground for reconsideration or vacatur. KAT's motion to file an amicus brief was denied and its request to move for Justice Geske's disqualification was dismissed on September 15, 1994. ES&G's motion for reconsideration was denied on October 25, 1994, and the record was remitted to the circuit court on November 17, 1994.

On November 29, 1994, one year after oral argument, more than two months after KAT's request was denied and almost a month and one-half after ES&G's reconsideration motion was denied, ES&G filed the present motion, asserting that Justice Geske was disqualified under sec. 757.19(2) and (3), Stats.,[2] from participating in the original decision and

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[2] 757.19 Disqualification of judge.

* * * * * *

(2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

(a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.

(b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

(c) When a judge previously acted as counsel to any party in the same action or proceeding.

asking for the vacation of the decision of June 16, 1994, or, in the alternative, for rehearing without the participation of Justice Geske. It is clear that ES&G previously waived any objection it might have had to Justice Geske's participation. We dismiss the motion for this reason, but we point out that, even if the disqualification issue had been raised timely on reconsideration, it would have been determined to be without merit.

We set forth the significant facts. The case was argued to the court on Monday, November 29, 1993. At the outset of the argument, shortly after counsel for one of the petitioners on review commenced his presentation, Justice Geske stated:

> "I ... want to make a disclosure. Last night when I was looking one more time at the amicus briefs, I noted that Mr. Burrell had filed an amicus brief on behalf of the Insurance Environmental Litigation

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(d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.

(e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.

(f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.

(g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

(3) Any disqualification that may occur under sub. (2) may be waived by agreement of all parties and the judge after full and complete disclosure on the record of the factors creating such disqualification.

> Association, and I looked at the appendix and I noted that one of the companies listed in that is St. Paul Companies. My husband is employed by that company. I do not believe that presents any conflict and will not influence me. If anybody has any objections to me sitting on this case, I would appreciate hearing from you in letter by the end of the week."

Justice Geske's declaration in open court disclosed that her husband was an employee of a company that, while not a party to the litigation, was a member of an association that had submitted a nonparty amicus brief. No objection was raised by any of the parties at oral argument nor was any objection raised "by the end of the week." No objection to Justice Geske's participation whatsoever was raised until KAT, a nonparty, raised the question in the proposed amicus brief it tendered to the court on September 2, 1994.

The disqualification statute provides that any disqualification "may be waived by agreement of all parties and the judge after full and complete disclosure on the record of factors creating the disqualification." Section 757.19(3), Stats. It is significant to note that ES&G does not argue that the disclosure made by Justice Geske and the setting of a time limit to object or to waive objection to her participation was not a proper procedural framework for the waiver of disqualification. Rather, counsel for ES&G argues that the disclosure was not sufficient--that it did not constitute a "full and complete disclosure."

Wisconsin law, sec. 19.43, Stats., and the rules of this court, SCR 60.18, require members of the judiciary to file each year with the Ethics Board a statement of economic interests, including their assets and liabilities. As matters of public record, those statements are available for inspection by any interested person. A judge in a particular case who is aware of facts that may be relevant to the issue of his or her disqualification must disclose those facts to the parties for purposes of waiver under sec. 757.19(3), Stats. This is a duty imposed on a judge by law. A party concerned about those facts should then, at a minimum, examine the judge's financial disclosure on record because information in those records may prompt further inquiry.

We conclude that under the circumstances of this case the disclosure made by Justice Geske was sufficient--that all the facts necessary for counsel to determine whether to assert or waive any disqualification were either disclosed or were readily obtainable of record prior to the "weekend deadline" suggested by Justice Geske. Following that disclosure, if ES&G had been concerned, it could have examined the financial disclosures Justice Geske had filed with the Ethics Board and if those disclosures did not satisfy ES&G in respect to Justice Geske's financial ties to St. Paul Companies, it could have asked for more information from her or could have advised her "by the end of the week" that it objected to her participation.

If ES&G's counsel examined the public record, it apparently did not deem the information in it sufficient to pursue the disqualification issue. Now, however, ES&G's substituted counsel asserts that Justice Geske's disqualification was required on the basis of inferences it

makes from that information. Clearly, ES&G waived any possible disqualification by not acting by the "end of the week" and for one year following oral argument.

Even after the court's decision on June 16, 1994--after learning that Justice Geske was the scrivener for the court--ES&G's counsel did not raise the question of Justice Geske's qualification to sit but asserted in its reconsideration motion only that the court had failed to follow what counsel considered controlling law. Despite the fact that ES&G had been served with a copy of KAT's proposed amicus motion and brief raising the disqualification issue, it did not join in KAT's motion or express to the court in its motion for reconsideration on the merits any position in respect to disqualification.

Hence, we conclude that on at least two discrete occasions ES&G's counsel failed to make any objection to Justice Geske's participation. These successive waivers in themselves bar ES&G from asserting its motion for vacatur at this time, months after it could have informed itself of the facts on which its motion is based and made any concern known to the court. The motion must be dismissed.

We could well rest our determination of the motion solely upon the absence of ES&G's timely assertion of its purported rights or we could, and do, base it also on the fact that there has been one reconsideration of the court's decision and we will not entertain a request for a second. Blau v. City of Milwaukee, 232 Wis. 197, 208, 285 N.W. 347, 286 N.W. 874, 287 N.W. 594 (1939). Nonetheless, when there is an attack upon the impartiality of the court or of one of its justices, we should determine whether such

attack is meritorious or meretricious. We conclude that the instant assault upon this court by ES&G is the latter.

First, it must be noted that all of ES&G's arguments for disqualification hinge upon its persistent and unfounded assertion that St. Paul Companies is in essence a party to the action. It is not. The Insurance Environmental Litigation Association, of which St. Paul Companies is a member, filed a non-party amicus brief. St. Paul is not a party and Attorney Hogan is not its counsel in this case.

Second, ES&G overlooks the fact that the lacunae in information that it now asserts made Justice Geske's in-court disclosure defective was a matter of record at least since Justice Geske filed her Statement of Economic Interests with the Ethics Board, pursuant to sec. 19.43, Stats., on December 14, 1993.[3] That document, a public record, sets forth that Justice Geske's husband, Michael Hogan, was an attorney-employee for St. Paul Fire & Marine Company and that she and her immediate family owned a "savings plus program for St. Paul Fire & Marine--St. Paul stocks and mutual funds" of a combined value of more than $50,000. Further, contrary to ES&G's assertion that Justice Geske did not disclose that she and her husband had a financial interest in St. Paul's employee pension plan, her financial disclosure recites that one of the family assets is a retirement plan with St. Paul Fire & Marine. (Addendum to Statement of

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[3] ES & G appended a copy of that statement to its brief in support of the instant motion.

Economic Interest filed on December 14, 1993.)[4] Had there been any real concern over the Geske-Hogan holdings in St. Paul Insurance Company following the in-court disclosure, ES&G had every opportunity to assert it. It did not.

It is also alleged that Justice Geske did not disclose that St. Paul had a significant interest in the litigation. Once Justice Geske announced that Attorney Hogan was employed by St. Paul, the parties, including ES&G, were in a position to ascertain whether St. Paul's interest was significant. Yet, when the employment relationship of Justice Geske's husband with St. Paul was disclosed, ES&G did not raise St. Paul's interest or of the Geske-Hogan interest as potentially requiring disqualification and did not do so thereafter when it moved for reconsideration. Only after the initial adverse decision on the merits and after having been rebuffed on the merits of its motion for reconsideration did ES&G, by its substituted counsel, raise the issue of the extent of St. Paul's interest in the underlying litigation.

ES&G dismisses as irrelevant to a determination of disqualification on the basis of financial interest the one

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[4] It should be noted that counsel for ES & G repeatedly refers to the precedent of federal court decisions as being dispositive in this court. Under federal statutes, any financial interest, no matter how insignificant, or factually irrelevant, may be a basis for disqualification. 28 U.S.C.A. sec. 455(b)(4) and (d)(4). That is not the law of the State of Wisconsin, which requires disqualification only if there is a "significant financial or personal interest." It is not asserted that the interest of the Justice or her family is significant. The complaint of ES & G is that it lacks the information needed to assert that the interest is significant.

factor relevant here to the issue of disqualification--Justice Geske's statement, "I do not believe [my husband's employment with St. Paul Companies] presents any conflict and will not influence me." While not relevant in respect to sec. 757.19(2)(f), Stats., that statement is far from irrelevant. Because, on the facts of record, none of the grounds for mandatory disqualification has any objective factual basis, the only basis for Justice Geske's disqualification would be that set forth in sec. 757.19(2)(g), Stats., "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." (Emphasis supplied.)

As pointed out in American TV, supra, 151 Wis.2d at 182, 443 N.W.2d 662 the determination under sec. 757.19(2)(g), Stats., unlike the other subdivisions of the statute, is a subjective one. That, however, does not prevent the parties from bringing to the judge's attention facts that may bear on that determination. Here, Justice Geske announced to the world that the fact that her husband worked for the St. Paul Companies would not influence her decision. It was appropriate for her to so state and it invited counsel to challenge the statement on the basis of objective facts. Counsel did not do so within the time specified by Justice Geske--"the end of the week"--and ES&G did not do so when it moved for reconsideration eight months later. ES&G did not raise the disqualification issue until one year later.

The assertion that Justice Geske failed to make a disclosure of facts that counsel could have fully explored in the public record can only be explained by ES&G's continued effort to ignore facts that were apparent and available to anyone who thought them to be of concern. While

reasonable persons may disagree on the merits of the original decision, as did the author of this opinion, no reasonable person can argue on the basis of objective facts or on the basis of the subjective test under sec. 757.19(2)(g), Stats., that Justice Geske acted in other than an impartial and just manner.

We point out that a complaint was made to the Judicial Commission alleging that Justice Geske's participation in this case constituted a violation of the Code of Judicial Ethics. That complaint was dismissed upon the Judicial Commission's determination that there was no probable cause to believe that any violation whatsoever occurred.[5] While the Judicial Commission's letter appended hereto is evidence that Justice Geske has been completely exonerated by the tribunal authorized to investigate and charge judges for ethical violations, we do not rely on that determination.

Our review of the record establishes that the claims made in the motion for vacatur and for disqualification in the event of further proceedings are meritless and untimely. Further, ES&G's untimely arguments have had the effect of delaying the final decision in the case and have disrupted the orderly procedures of this court.

Motion dismissed with costs.

GESKE, J., did not participate.

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[5] See appended letter of Judicial Commission dated January 17, 1995.

APPENDIX

State of Wisconsin

JUDICIAL COMMISSION

James C. Alexander
Executive Director Phone: 608-266-7637
Suite 606, Tenney Building
110 East Main Street
Madison, Wisconsin 53703-3328

January 17, 1995

CONFIDENTIAL

Honorable Janine P. Geske Justice, Wisconsin Supreme Court 231 East, Capitol Madison, Wisconsin

Dear Justice Geske:

On December 16, 1994, the Judicial Commission considered the allegation of misconduct filed against you for your participation in the case City of Edgerton et al. v. General Casualty Company of Wisconsin et al., Case No. 91-1408.

As I stated in my letter of December 20, 1994, the Commission's review of the investigation resulted in its determination that probable cause did not exist that a violation of the Code of Judicial Ethics had occurred. The matter has accordingly been closed.

It is my understanding that you are waiving your right to confidentiality under s 757.93, Wisconsin Statutes, only for the specific purpose of filing this letter in the court file of the case involved, with copies to the attorneys of record.

Again, thank you for your cooperation with the Commission in the investigation of this matter.

Very truly yours, /s/ James C. Alexander

James C. Alexander

Attorney at Law

STATE OF WISCONSIN : IN SUPREME COURT

DISTRICT 4
EDGERTON, CITY v. GENERAL CASUALTY CO.,
#91-1408

IT IS ORDERED THAT THE MOTION FOR RECONSIDERATION IS DENIED WITH COSTS.

C.J. HEFFERNAN, J. ABRAHAMSON AND J. BABLITCH DISSENT.

IT IS FURTHER ORDERED THAT THE MOTION TO STRIKE PORTIONS OF MEMO IN SUPPORT OF MOTION FOR RECONSIDERATION AND THE MOTION TO FILE MEMO IN SUPPORT OF MOTION FOR RECONSIDERATION ARE DISMISSED.

Dated: October 25, 1994.

Marilyn L. Graves
Clerk of Supreme Court

STATE OF WISCONSIN : IN SUPREME COURT

No. 91-1408

City of Edgerton and
Edgerton Sand & Gravel, Inc.,

Plaintiffs-Respondents,

v.

General Casualty Company
of Wisconsin,

Defendant-Appellant-Petitioner,

Wisconsin Insurance Security Fund,

Defendant,

Aetna Casualty and Surety Company,

Defendant-Co-Appellant-Petitioner,

Hanover Insurance Companies,
Wausau Insurance Companies and
Local Government Property Insurance Fund,

Defendants.

REVIEW of a decision of the Court of Appeals. *Affirmed in part, reversed in part, and remanded.*

Filed June 16, 1994.

JANINE P. GESKE, J. This is a review of a published decision of the court of appeals, *City of Edgerton v. General Cas. Co.*, 172 Wis. 2d 518, 493 N.W.2d 768 (Ct. App. 1992), which affirmed in part and reversed in part a judgment of the circuit court for Rock County, John H. Lussow, Circuit Judge. The circuit court granted summary judgment to the plaintiffs, City of Edgerton (the City) and Edgerton Sand and Gravel, Inc. (ES&G). The City and ES&G sought a declaration of their rights under insurance policies issued by General Casualty Company of Wisconsin (General Casualty) and Aetna Casualty and Surety Company (Aetna).[6] The City and ES&G claimed that the policies provided coverage for environmental remediation costs resulting from the operation of a landfill located in the City.

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[6]Both the City and ES&G maintained insurance policies for personal injury liability from approximately 1973 to 1986. Specifically, ES&G received primary coverage from Iowa National Mutual Insurance Co. for the period of January, 1973 to January, 1984 (Iowa National is now insolvent). Primary coverage from January, 1984 to January, 1986 was provided by General Casualty. ES&G also maintained an excess coverage policy, issued by Aetna, from April, 1974 to April, 1977.

Iowa National also issued a primary coverage policy to the City for April, 1977 to April, 1981. That coverage was then carried by General Casualty from April, 1982 to April, 1986. Aetna did not issue a policy to the City at any time.

Both ES&G and the City agree that General Casualty's policies commencing *after* 1984 do not provide coverage.

The circuit court agreed and granted the motion for summary judgment. The court of appeals reversed that decision.

General Casualty and Aetna filed cross-motions for summary judgment in the circuit court, claiming that (a) no suit seeking damages had been filed which would trigger a duty to defend, and (b) the failure of ES&G to provide notice of an occurrence or claim precluded coverage. The circuit court denied the cross-motions, and the court of appeals affirmed.

We now affirm the court of appeals decision with regard to the City's and ES&G's motion for summary judgment and reverse the court of appeals decision with regard to General Casualty's and Aetna's cross-motions for summary judgment.

Of paramount concern in this case is whether the insurance policies for which ES&G and the City contracted require a duty to defend against federal and state agencies' demands for environmental cleanup. Consequently, the following issues of first impression are before the court:

(1) Does the receipt of certain letters from a governmental agency requesting voluntary participation in environmental cleanup efforts constitute a "suit seeking damages" sufficient to trigger an insurance company's duty to defend?

(2) Do cleanup and remediation costs under CERCLA[7] and equivalent state statutes[8] constitute "damages" within the context of a comprehensive liability insurance policy?

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[7]CERCLA, or the Comprehensive Environmental Response, Compensation and Liability Act of 1980, is also known as "Superfund" and was designed to provide for the cleanup of hazardous waste. The act empowered the federal government, through the Environmental Protection Agency (EPA), to identify hazardous waste sites and pursue remedial activities. As part of the remedial process, the government may perform the cleanup and seek compensation from responsible parties or require the polluters to do the cleanup.

Following the implementation of CERCLA in 1980, state legislatures enacted similar legislation which would apply to hazardous waste identified under the federal program, as well as reach to other substances that individual states had the need to control. *See* Howell A. Burkhalter, Comment, *Liability for CERCLA Cleanup Costs--Are Insurers the Victims of Judicial Activism?*, 26 Wake Forest L. Rev. 221, 222 n.8 (1991).

CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) and is codified at 42 U.S.C. secs. 9601-9675 (1988 & Supp. 1992). This amendment served to buttress the original legislation.

Throughout this opinion, CERCLA will be cited as 42 U.S.C. sec. _____.

[8]Sections 144.43 to 144.79, Stats., comprise subch. IV of ch. 144 and focus upon solid waste, hazardous waste, and refuse. Specifically, secs. 144.442 and 144.443 establish the process for environmental repair and the financial responsibility associated with it. Various sections within this subchapter will be referred to in pertinent part throughout this opinion.

(3) Do the personal injury provisions of an insurance policy provide coverage for environmental cleanup costs when there has been no allegation of wrongful entry, eviction, or other invasion of the right to private occupancy?

(4) Is the "insured's own property" exclusion applicable so as to preclude coverage for cleanup and response costs incurred to remediate the insured's own property?

The threshold question in this case is whether the receipt by ES&G and the City of letters by the Wisconsin Department of Natural Resources (DNR), requesting remediation of a contaminated site, triggered General Casualty's and Aetna's duty to defend the City and ES&G as their insureds. The court of appeals concluded that the duty to defend arose when a federal or state environmental agency identified a potentially responsible party (PRP)[9] which it

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[9]42 U.S.C. sec 9622(e)(1) provides in pertinent part:

> Whenever the President determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible parties for taking response action (including any action described in section 9604(b) of this title) and would expedite remedial action, the President shall so notify all such parties....

Once a PRP is notified of its status under this section, it has three options: (1) do nothing and wait for the government to recover the costs of the cleanup; (2) clean up the affected site or join with other PRPs to effect a cleanup; or (3) litigate with the government so as to possibly secure a more favorable future result. *See* Joanna L. Johnson,

unequivocally required to pay the cost of, or participate in paying the cost of, landfill remediation. *Edgerton*, 172 Wis. 2d at 530. However, the duty to defend is not triggered unless the suit seeks damages. *Id.* (citing *Shorewood School Dist. v. Wausau Ins.*, 170 Wis. 2d 347, 366, 488 N.W.2d 82 (1992)). Damages, according to the court of appeals, are remedial in nature, not preventive, and therefore do not encompass the cost of complying with an injunctive decree. *See Shorewood School Dist.*, 170 Wis. 2d at 370. Though General Casualty and Aetna argued that Superfund remediation and cleanup costs were incurred in response to claims for injunctive relief, the court of appeals concluded that the manner in which the term "damages" was used in the insurance policies at issue contemplated costs incurred when responding to the Superfund initiative.

We now hold that the DNR's notification to ES&G and the City by letter that ES&G and the City were potentially responsible parties and liable for hazardous waste site remediation costs does not trigger the insurers' duty to defend because the letters do not constitute a "suit seeking damages" within the plain meaning of the insurance policies contracted for and issued to ES&G and the City.

Comment, *Whether Insurers Must Defend PRP Notifications: An Expensive Issue Complicated by Conflicting Court Decisions*, 10 N. Ill. U.L. Rev. 579, 581 n.8 (1990) [hereinafter *Whether Insurers Must Defend*].

This holding makes it unnecessary for us to further analyze the personal injury and pollution exclusion provisions of the policies at issue.

The relevant facts are as follows. ES&G owns a landfill site in Rock County, consisting of approximately ten acres.[10] The site, located on the southern border of the City, accommodated sand and gravel operations as well as serving the City's landfill from 1968 to 1984.

By 1978, the DNR informed ES&G by letter that it suspected groundwater contamination at the site. The DNR recommended that the landfill be closed and capped. In 1984, volatile organic compounds (VOCs) were detected in the groundwater under and in the vicinity of the site. ES&G closed the landfill on December 30, 1984, and, during the next year, the site was capped.[11] Though the site was

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[10]The site of the landfill was owned by the Sweeney family (owners of ES&G). From the early 1950's until the time of its closing in December of 1984, the landfill was used as a dump and burn site for waste materials. From 1968 to 1984, the City of Edgerton leased the site for landfill operations. Licensing information indicates that the site was to be a depository for municipal waste, not hazardous or industrial wastes. However, ES&G and the City have claimed that sludge from the City's water treatment plant was also dumped at the site.

[11]"Capping" of the landfill required the construction of a clay cap, consisting of approximately two and one-half feet of clay material, over which was deposited six inches of topsoil. Ground cover was planted over the cap to ensure soil stability. Construction of the clay cap was done with DNR approval.

closed, groundwater contamination remained, and the DNR recommended the landfill for placement on the EPA's list of contaminated sites for priority cleanup.

On June 22, 1989, the EPA notified ES&G and the City by certified letter[12] that the EPA was investigating the circumstances surrounding the presence of hazardous

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[12]The letter from the EPA stated the following in pertinent part:

> The United States Environmental Protection Agency (U.S. EPA) is presently investigating the circumstances surrounding the presence of hazardous substances in and around the Edgerton Sand & Gravel Site in Rock County....
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> Pursuant to the authority of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. [sec.] 9604(e), amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 [SARA], and pursuant to Section 3007 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. [sec.] 76927, you are hereby requested to respond to the following Information Requests. Compliance with the following Information Requests is mandatory....

The information requests focused upon the City's and ES&G's possession, custody or control relating to the operation/cleanup of the landfill and to the storage and/or disposal of hazardous substances at the site.

substances in and around the landfill.[13] The EPA then requested that ES&G and the City (now considered PRPs) respond to the DNR's request for information regarding the disposal of hazardous substances at the landfill from 1950 to 1984.

In July, 1989, both the City and ES&G forwarded the letters received from the EPA to their primary carrier, General Casualty. Each separately requested defense coverage. ES&G specifically requested that General Casualty pay any costs which ES&G may have incurred regarding the site.

In February, 1990, the DNR sent certified letters to the City and ES&G, giving each 30 days to propose a plan for remediation of the site and any problems associated with it.[14] Failure to respond would result in the listing of the site

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[13]This course of action by the EPA was pursuant to 42 U.S.C. sec. 9604(e).

[14]In its letter, the DNR stated that the remediation plan must comprehensively describe the actions required to determine the extent of the contamination and to remediate it in accordance with state regulations. The plan must also follow the guidelines established by the EPA.

Section 144.442, Stats., outlines actions to be taken regarding environmental repair. Section 144.442(8) specifically articulates how the Superfund act shall be implemented in the state:

> (8) IMPLEMENTING THE FEDERAL SUPERFUND ACT. (a) The department [of natural resources] may advise, consult, assist and contract with

other interested persons to take action to implement the federal comprehensive environmental response, compensation and liability act of 1980, 42 USC 9601, et seq., in cooperation with the federal environmental protection agency. These actions include all of the actions under subs. (4) to (6). The department may enter into agreements with the federal environmental protection agency.

(b) The department may expend moneys from the appropriations under ss. 20.370(2)(dv) and 20.866(2)(tg) as required under 42 USC 9601, et seq. The department shall promulgate by rule criteria for the expenditure of moneys from the appropriations under ss. 20.370(2)(dv) and 20.866(2)(tg), the moneys available from other sources for the required sharing of costs, the differences between public and private sites or facilities, the potential for cost recovery from responsible parties and any other appropriate factors.

(c) 1. The department may require a municipality to pay a reasonable share of the amount expended by the department for a project under par. (b). The department shall base any share charged to a municipality for a project under par. (b) on the following factors:

a. The municipality's responsibility for the site or facility affected by the project.

b. The benefit that the municipality receives from the project.

c. The municipality's ability to pay for the project.

on CERCLA's National Priorities List (NPL) or state action.[15] By April, 1990, ES&G notified Aetna, its excess insurer, of the receipt of the EPA information request letter and the DNR enforcement letter. Again, ES&G requested coverage of defense costs as well as any liability resulting from EPA or DNR claims. General Casualty denied coverage and a defense for the City and ES&G. Aetna denied the same for ES&G.

Both the City and ES&G, in a declaratory action begun in December, 1990, sought to define the obligations of General Casualty and Aetna under the insurance policies. Specifically, both the City and ES&G claimed that General Casualty and Aetna were obligated to defend and indemnify

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2. The total amount charged to all municipalities who are charged for the project may not exceed 50% of the amount expended by the department under par. (b) for the project.

3. The department shall promulgate rules establishing criteria for determining the responsibility, for the purposes of this subsection, of a municipality for a site or facility affected by the project under par. (b); the benefit a municipality receives from a project under par. (b); and the ability of a municipality to pay for a project under par. (b).

4. All monies received under this paragraph shall be credited to the environmental fund for environmental repair.

[15]The work plan was prepared and then filed July 11, 1991, in the DNR's southern district headquarters.

them for any liability arising out of DNR or EPA claims, actions, or suits involving the landfill. Additionally, ES&G and the City stated a claim for bad faith against General Casualty and Aetna for refusing to provide a defense. A motion for summary judgment was filed by the City and ES&G in March, 1991. In April, 1991, General Casualty filed a cross-motion for summary judgment which stated that (a) since no "suit seeking damages" had been filed, no duty to defend was triggered; (b) the insured's failure to give timely notice of an occurrence or claim precluded coverage under the policies; and (c) the bad faith claim ought to be dismissed. Aetna filed a similar cross-motion for summary judgment.

In May, 1991, the circuit court granted the City's and ES&G's motion for summary judgment and denied the cross-motions. However, the court did dismiss the bad faith claim.[16] In July, 1991, the circuit court entered an amended judgment from which General Casualty and Aetna appealed.

The court of appeals affirmed that part of the judgment which denied the insurers' cross-motions for summary judgment and reversed that part of the judgment which granted ES&G's and the City's motion for summary judgment. The court of appeals concluded that (a) the

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[16]Both General Casualty and Aetna moved the circuit court, as an alternative to their cross-motions for summary judgment, to order a continuance so as to permit additional discovery. The circuit court ultimately did not rule on the motions for a continuance, and the court of appeals decision rendered moot each insurer's claim that the circuit court erroneously exercised its discretion by not addressing those motions.

insurers' duty to defend was not triggered by the PRP letters from the EPA in June, 1989, but was triggered by the receipt of the letters from the DNR in February, 1990; (b) the DNR letters unequivocally imposed upon the City and ES&G responsibility to remediate and clean up the landfill or to bear the cost of the remediation which necessitated a defense by the insurers; and (c) remediation costs are damages within the meaning of the term in the policies.

Summary judgment under sec. 802.08(2), Stats.,[17] shall be rendered when no genuine issue as to any material fact exists, and the moving party is entitled to a judgment as a matter of law. Summary judgment should not be granted "unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy...." *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W. 2d 473 (1980). A party seeking summary judgment must, therefore, demonstrate to the court that a trial is unnecessary by establishing a record which sufficiently illustrates that no

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[17]Section 802.08(2), Stats., provides:

> **802.08 Summary judgment....**
>
> (2) Motion.... The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

triable issues of material fact exist on any issue presented. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis. 2d 349, 356, 286 N.W. 2d 831 (1980) (citing *Hilkert v. Zimmer*, 90 Wis. 2d 340, 342, 280 N.W. 2d 116 (1979)). If the movant's papers before the court do not clearly establish the absence of such a material fact, the court shall deny the motion. *Grams*, 97 Wis. 2d at 339.

On appeal, this court must review the grant or denial of a summary judgment motion by applying the standards set forth in sec. 802.08, Stats., just as the circuit court is to apply them. *Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991) (citing *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W. 2d 816 (1987)).

DUTY TO DEFEND

Every insurance agreement functions as a contract between the insured and the insurer. Each party to the contract owes certain duties and obligations to the other. The issue in this case is not, as the dissent infers, "Who will pay the costs of environmental cleanup?", but is one of interpretation of the insurer's contractual duties. The insurer maintains two obligations, the duty to indemnify the insured in the event of a loss and the duty to defend the insured against suits which fall under the terms of the policy. *See* Mitchell L. Lathrop, *Insurance Coverage for Environmental claims* sec. 8.03[1][a] at 8-24 (1994). The duty to defend "is predicated on allegations *in a complaint* which, if proved, would give rise to recovery under the terms and conditions of the insurance policy." *Elliott v. Donahue*, 169 Wis. 2d

310, 320-21, 485 N.W.2d 403 (1992) (emphasis added) (citing *Sola Basic Industries, Inc. v. U.S. Fidelity & Guaranty Co.*, 90 Wis. 2d 641, 646, 280 N.W.2d 211 (1979)). As the court of appeals stated in *Nichols v. American Employers Ins. Co.*, 140 Wis. 2d 743, 749, 412 N.W.2d 547 (Ct. App. 1987):

> The duty to defend exists independent of the duty to investigate. Indeed, a duty to defend does not even arise until there has been a suit initiated. *See Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1183 (7th Cir. 1980) *cert. denied* 449 U.S. 1033 (1980). As *Sola Basic* points out, once the suit is initiated, the insurer must make a determination of whether it is obligated to defend the suit. The determination is made based upon the allegations in the third party's complaints.

The language of the policy issued by General Casualty states that the company maintains the "right and duty to defend *any suit* against the insured *seeking damages*...." (Emphasis added.) Aetna's excess insurance policy for ES&G similarly states that the company will "defend *any suit seeking damages* which are not payable on behalf of the insured under the terms of the policies of Underlying Insurance...." (Emphasis added.) Neither policy requires the insurance companies to defend against a "claim" made against an insured. The only duty imposed on the insurers is to defend against suits seeking damages from the insureds.

Therefore, in order to determine whether the insurance companies have a duty to defend in this case, we must decide whether there is a suit seeking damages against the insureds.

WHAT CONSTITUTES A "SUIT"?

The expansive authority granted to state and federal agencies under CERCLA, in order to initiate environmental cleanup of hazardous waste, has had the effect of producing a flood of litigation so as to determine who will pay the cleanup costs--the PRP or the PRP's insurer. Though comprehensive analyses of insurance policy language and policy drafting records have been performed by courts across the country, there has been no definitive, nationwide resolution of the ultimate issue--whether the general comprehensive liability policy--the "CGL"--imposes a duty to defend a federal or state demand for environmental remediation and cleanup costs.[18] Instead, courts have

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[18]A majority of courts *have not* conclusively determined that a CGL imposes a duty to defend following the receipt of a PRP letter. Rather, courts have bene very divided on this issue when analyzing (a) the nature and timing of the acts which give rise to a pollution-related problem; (b) the role the CGL insured plays in those acts; and (c) the nature of the relief sought against the CGL insured. *See* Barry R. Ostrager, *Special Insurance Coverage Issues Arising Out of Hazardous Waste/Environmental Clean-Up Litigation*, American Law Institute (1993). Further, one must carefully distinguish among the issues raised in this type of environmental litigation, in addition to the duty to defend: the role of the pollution exclusion clause, the scope of CGL coverage for environmental claims, and coverage under the personal injury endorsement. Again the split among the courts is far more self-evident than a majority view.

For example, the following is a partial list of decisions which have held that a duty to defend was invoked with the issuance of a PRP letter: *Village of Morrisville Water & Light Dept. v. USF&G*, 775 F. Supp. 718 (D. Vt. 1991) (the EPA clearly warned the insured of the probability of imminent government action, enforceable by a court of law, if it did not respond to the letter; the PRP letter is the equivalent to the start of a lawsuit); *Avondale Industries, Inc. v. Travelers Indem. Co.*, 697 F. Supp. 1314 (S.D. N.Y. 1988), *aff'd* 887 F.2d 1200 (2d Cir. 1989), *reh'g denied* 894 F.2d 498 (2d Cir. 1990), *cert. denied* 496 U.S. 906 (1990) (an action may be taken which binds the insured before a suit is filed; since damages may be determined before the parties arrive in court, the administrative process is part of the litigious process which triggers the obligation to defend); *Fireman's Fund Ins. Companies v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987) (the duty to defend is not restricted to the traditional lawsuit for money damages, but extends to the actual or threatened use of the legal process to coerce payment); *Hazen Paper v. U.S. Fidelity and Guar.*, 407 Mass. 689, 555 N.E.2d 576 (1990) (though literally there is no suit, the litigation defense protection purchased by Hazen would be compromised if USF&G did not defend in response to the EPA letter); *Minnesota Min. & Mfg. v. Travelers Indem.*, 457 N.W.2d 175 (Minn. 1990) (the issue of coverage does not depend merely on the form of action taken against the insured; the proceeding commenced is equally as coercive as a civil judgment against the insured); and *Cascade Pole Co. v. Reliance Insurance Co.*, No. 88-2-2316-3 (Wash. Super. Ct. March 20, 1992) (a PRP letter is a suit because remediation and response costs may be incurred and because they establish adversarial relationships).

The following decisions have held that a PRP letter does not trigger the duty to defend under a CGL policy: *Harter Corp. v. Home Indem. Co.*, 713 F. Supp. 231 (W.D. Mich. 1989) (the court cannot construe an EPA threat to hold the insured liable for cleanup costs as a suit seeking damages without doing violence to the plain meaning of the word "suit"); *State of N.Y. v. Amro Realty Corp.*, 697 F. Supp. 99 (N.D. N.Y. 1988) (there is no duty to defend until an actual complaint in an environmental lawsuit is forwarded to the insurer); *Detrex Chem.*

developed definitions of what constitutes a "suit" when environmental cleanup is required.

The CGL, which emerged onto the insurance industry scene in the early 1940's, provided broad, comprehensive insurance and served as a replacement for specific risk policies. *See* Paul V. Majkowski, Note, *Triggering the Liability Insurer's Duty to Defend in Environmental Proceedings: Does Potentially Responsible Party Notification Constitute a "Suit"?*, 67 St. John's L. Rev. 383, 384 n. 3 (1993).[19] The duty to defend clause in most CGL policies

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Industries v. Emp. Ins. of Wausau, 681 F. Supp. 438 (N.D. Ohio 1987), *modified on reh'g* (applying Wisconsin law), *reaff'd* 746 F. Supp. 1310 (N.D. Ohio 1990) (applying Michigan law) (a claim for damages made against the insured that might result in liability is not synonymous with a suit and not enough to trigger the duty to defend); *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) (no obligation to defend since the attorney general had not sued for cleanup costs; an administrative arena to compel cleanup was merely sought); and *Technicon Electronics v. American Home*, 141 A.D. 2d 124 (N.Y. App. Div. 1988), *aff'd on other grounds* 542 N.E. 2d 1048 (1989) (the PRP letter does not constitute a suit).

[19]As Mr. Majkowski notes in his article, insurance industry trade organizations produced a standard CGL form following a series of drafts from 1941 to 1973. Coverage as of 1966 was provided for any "occurrence" as opposed to "accidents." "Occurrence" was defined as "'an accident, including *injurious exposure to condition*, which results [in injuries or damages] ... neither expected nor intended from the standpoint of the insured....'" (Emphasis added.) during the period of these revisions, coverage was expanded and included pollution claims. However, by 1986, the insurance industry drafted a more strict CGL form in order to limit coverage of various pollution claims. *Id.* Disputes under the stricter CGL forms focus on the meaning of

beginning in 1973 stated that "the company shall have the right and duty to defend any suit against the insured seeking damages on account of such [covered] bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent...." *See* Donald E. Shrape & Jean K. Shaffer, *The Parameters of an Insurer's Duty to Defend*, 19 Forum 555, 556 (1984).[20] The specific language in the comparable clause of the General Casualty policy at issue in this case reads in pertinent part:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the

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"damages" and absolute pollution exclusion provisions.

[20]The interpretation of the CGL regarding potential coverage for PRP notification letters has posed problems for courts across the country. The PRP notification describes a form of liability not compatible with pre-1980 policy language. As a result of CERCLA, a new type of remedy has come into being: combining monetary relief with site cleanup. Additionally, fines may be assessed which were not historically contemplated by a CGL insurer. *See* Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* sec. 8.03 (1991); *see also Whether Insurers Must Defend*, 10 N. Ill. U.L. Rev. at 582.

> right and duty to defend *any suit against the insured seeking damages* on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

(Emphasis added.)

When ES&G and the City responded to the EPA and DNR letters, both were involved in an administrative procedure pursuant to CERCLA. Therein lies the heart of the dispute: does the duty to defend in a CERCLA proceeding arise at this administrative level? The controversy is further complicated by the fact that CERCLA was designed to have an anti-litigation bias. 42 U.S.C. sec. 9622(a) states that "[w]henever practicable ... [the EPA] shall act to facilitate [settlement] agreements ... in order to expedite effective remedial actions and minimize litigation." Therefore, notice letters have been used by the EPA as a primary method to effect voluntary settlements with PRPs. However, if a PRP chooses to ignore the notice letter, it may face liability for recovery costs into the tens of millions of dollars resulting from EPA-initiated cleanup.

Some courts have concluded that PRP letters have a unique nature within the context of a CERCLA administrative proceeding. These courts have held that the receipt of PRP letters is the "functional equivalent of a suit" because (a) the letters maintain a confrontational and adversarial posture, and (b) they create the specter of devastating financial consequences if voluntary cooperation is not forthcoming. As a result, PRP liability for immediate and long-range cleanup and remediation costs necessitates a legal defense.[21]

We conclude that neither a PRP letter nor a comparable notification letter by a state agency such as the DNR triggers the insurer's duty to defend. Though the court of appeals was correct when it concluded that the PRP letters to the City and ES&G did not trigger the insurers' duty to defend, it should have arrived at the same conclusion

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[21]Requests to insurers for a defense are often made in conjunction with a reimbursement request for the following: (a) the retention of environmental consultants; (b) the formulation and implementation of remedial work plans; and (c) investigation costs. *See Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp.* 948 F.2d 1507 (9th Cir. 1991); *Ray Industries, Inc. v. Liberty Mut. Ins. Co.*, 728 F. Supp. 1310 (E.D. Mich. 1989), *rev'd in part, reh'g denied* 974 F.2d 754 (6th Cir. 1992); *Avondale Industries, Inc. v. Travelers Indem. Co.*, 697 F. Supp. 1314 (S.D. N.Y. 1988), *aff'd* 887 F.2d 1200 (2d Cir. 1989), *reh'g denied* 894 F.2d 498 (2d Cir. 1990), *cert. denied* 496 U.S. 906 (1990) (receipt of a PRP letter could have immediate adverse consequences for the insured, and the administrative process is part of a "litigious process" that triggers the duty to defend); *Fireman's Fund Ins. Companies v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987) (coverage does not hinge on the form of the action taken or the nature of the relief sought); and *Minnesota Min. & Mfg. v. Travelers Indem.*, 457 N.W.2d 175 (Minn. 1990).

regarding the DNR letters. Those letters stated in pertinent part:

> On November 6, 1989, the Department forwarded to you the CERCLA 104(a) responses it received as part of a potential responsible party (PRP) search for the Edgerton Sand and Gravel landfill site. These responses were forwarded to you as part of a joint effort to begin remediation of the known environmental impacts from the site. To date the Department has not received any progress reports on your efforts to arrange for a PRP clean up of the landfill. In our November 6, 1989, letter the Department stated that failure of the PRP's to reach agreement on a clean up plan would force the Department to pursue having the site included on the Superfund National Priorities List (NPL).
>
> The environmental problems associated with this site dictate that remediation work begin soon. Consequently, the Department will allow you only another 30 days from the date of this letter to propose a PRP implemented remediation work plan....
>
> The work plan must contain a detailed discussion of the tasks to be performed and a timeline for the tasks to occur.... Also, a legally enforceable contract between the Department and the PRP's must be signed

> within 60 days after a PRP work plan is submitted to the Department, to ensure that the work is completed properly and on schedule.

The DNR then went on to state that if an acceptable work plan was not submitted by the deadline date, it would pursue the following action: (a) an attempt to have the landfill listed on the NPL as quickly as possible and (b) legal action under state authorities to have the site investigated and cleaned up. The DNR also referred to statutory authority under secs. 144.43 to 144.79, Stats., by which the DNR could order the City and ES&G to remediate damage caused by the landfill.[22]

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[22]In sec. 144.01, Stats., the following applicable terms are defined: "environmental pollution," "hazardous substance," "solid waste," and "owner."

Subchapter IV of ch. 144 focuses upon solid and hazardous waste management and cleanup. Specifically, sec. 144.431 gives the DNR the following powers and duties regarding solid waste:

> **144.431 Solid waste; powers and duties.** (1) The department shall:
>
> (a) Promulgate rules implementing and consistent with ss. 144.43 to 144.47.
>
> (b) Encourage voluntary cooperation by persons and affected groups to achieve the purposes of ss. 144.43 to 144.47.
>
> (c) Encourage local units of government to handle solid waste disposal problems within their respective jurisdictions and on a regional basis, and

provide technical and consultative assistance for that purpose.

(d) Collect and disseminate information and conduct educational and training programs relating to the purposes of ss. 144.43 to 144.47.

(e) Organize a comprehensive and integrated program to enhance the quality, management and protection of the state's land and water resources.

(f) Provide technical assistance for the closure of a solid waste disposal facility that is a nonapproved facility, as defined in s. 144.441(1)(c).

(2) The department may:

(a) Hold hearings relating to any aspect of the administration of ss. 144.43 to 144.47 and, in connection therewith, compel the attendance of witnesses and the production of evidence.

(b) Issue orders to effectuate the purposes of ss. 143.43 to 144.47 and enforce the same by all appropriate administrative and judicial proceedings.

(c) Secure necessary scientific, technical, administrative and operational services, including laboratory facilities, by contract or otherwise.

(d) Advise, consult, contract and cooperate with other agencies of the state, local governments, industries, other states, interstate or interlocal agencies, and the federal government, and with interested persons or groups.

Neither letter has the attributes of a "suit." *See Detrex Chem. Industries v. Emp. Ins. of Wausau*, 681 F. Supp. 438, 446 (N.D. Ohio 1987) ("[A] claim for damages made against [the insured] that *might* result in its legal liability is not synonymous with a 'suit' so as to trigger [the insurer's] duty to defend....") (Emphasis added.)[23] This

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(e) Inspect solid waste facility construction projects to determine compliance with ss. 144.43 to 144.47 and rules promulgated and licenses issued under those sections.

Section 144.442, Stats., focuses upon environmental repair. Specifically, sec. 144.442(4) provides the DNR with the authority to conduct investigations of sites or facilities which pose an environmental pollution hazard. It is under this section that the DNR identifies PRPs. Section 144.442(5) authorizes the DNR to promulgate rules under which remediation plans are established. Section 144.442(6) provides the DNR with authority to take action for the purpose of environmental repair. Finally, under sec. 144.442(8) the DNR may take action to implement CERCLA by means of advising, consulting, assisting, and contracting with other interested parties.

[23]It should be noted that the Court in *Detrex* stated in dicta that the duty to defend would be triggered by a cost recovery action, an action for injunctive relief, or a state administrative proceeding in which a state agency was performing traditional judicial activities, thereby acting in a judicial capacity. Specifically, the court stated, "Until, pursuant to Section 9606, the EPA resorts to a court injunction or to a mandatory court order to enforce a section 9606(a) administrative order, ... a 'suit' would not be brought against [the insured] that would trigger [the insurer's] duty to defend." *Id.* None of the above actions occurred in the instant case. Rather, correspondence from the EPA was confined to information requests, at the early stages of the PRP compliance process. The DNR, in correspondence dated February, 1990 and February, 1991, detailed what action *may* be taken if a remediation

court has recently examined the attributes of a "suit" in *State v. P.G. Miron Const. Co., Inc.*, 181 Wis. 2d 1045, 512 N.W.2d 499 (1994), wherein we defined "suit" as

> 'any proceeding by one person or persons against another or others *in a court of law* in which the plaintiff pursues, *in such court*, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or equity.'

Miron, 118 Wis. 2d at 1053 (quoting *Black's Law Dictionary* 1434 (6th ed. 1990)) (emphasis added in *Miron*) (the use of arbitration under a contract between a private party and the state does not violate the doctrine of sovereign immunity because arbitration does not subject the state to suit). Thus, the primary attribute of a "suit" is that parties to an action are involved in actual court proceedings, initiated by the filing of a complaint. Despite the dissent's attempt to expand the word "suit," definitions of suit or legal process all involve a court action.[24] The clearest example of this is the

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work plan was not forthcoming from the City and ES&G. Neither letter identified any *legal* action which had already been initiated.

[24]For example, *Black's Law Dictionary* defines "legal proceedings" as follows:

> **Legal proceedings.** Term includes all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.

fact that the parties to the instant case were made part of a "suit" when a declaratory action was begun to identify General Casualty's and Aetna's obligations under the insurance policies.

Rather than initiating a suit, the letters from the EPA and the DNR to General Casualty and Aetna were used to gather information regarding hazardous substances at the site, as well as to call for voluntary action by the City and ES&G in the process of cleanup.[25] The court of appeals concluded that additional correspondence in February, 1991, from the DNR's Bureau of Legal Services moved the proceedings beyond the information-gathering stage. Specifically, the court referred to the following language of the letter:

> WDNR intends to pursue listing of this site on the NPL unless potentially responsible parties (PRPs) for the site enter into a contract with

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Black's Law Dictionary 896 (6th ed. 1990).

"Process" has also been defined as "[t]he entire course of a judicial proceeding." *The American Heritage Dictionary of the English Language* 1444 (3d ed. 1992).

[25]*See Technicon Electronics v. American Home*, 141 A.D.2d 124 (N.Y. App. Div. 1988), *aff'd on other grounds* 542 N.E.2d 1048 (1989). The court concluded that "[t]he EPA letter at issue merely informed Technicon of its potential liability under CERCLA and that the EPA was interested in discussing Technicon's voluntary participation in remedial measures. The letter was an invitation to voluntary action on Technicon's part and is not the equivalent of the commencement of a formal proceeding within the meaning of the subject comprehensive general liability policies." Technicon, 141 A.D.2d at 146.

> WDNR to undertake investigation and clean-up activities....
>
> The purpose of this letter is to notify you that unless a PRP group signs a contract with WDNR for this site by May 31, 1991, WDNR will request that this site be listed on the NPL.... For NPL sites, U.S. EPA adheres to a very strict timeframe for negotiation of Administrative Consent Orders. These Consent Orders generally require, among other things, strict compliance with the NCP [National Contingency Plan], reimbursement of agency oversight costs ... liquidated damages for noncompliance and the potential for treble damages. If the negotiation of a Consent Order is not successful, U.S. EPA may issue an Order requiring the PRPs undertake specific action or undertake the action and sue to recover its costs from the PRPs. U.S. EPA may seek forfeitures for non-compliance and treble damages may also be available.

Indeed, this correspondence indicates that there was some movement beyond the fact-gathering stage. However, there was no movement into the realm of a suit. The correspondence served to inform the PRPs of action which may be pursued, *or not*, depending upon the response by the City or ES&G. This letter cannot be considered the equivalent of a service of process so as to initiate a suit.

However, the court of appeals adopted the reasoning of *Ryan v. Royal Ins. Co. of America*, 916 F.2d 731 (1st Cir. 1990),[26] in which the court articulated a four-part test to determine if a PRP letter was the "functional equivalent of a suit": (a) the letter's coerciveness; (b) the letter's adversariness; (c) the seriousness of effort with which the government hounds an insured; and (d) the gravity of the imminent consequences. *Id.* at 741. The court of appeals then concluded that the EPA and the DNR had assumed an adversarial approach toward the City and ES&G and that devastating financial consequences would result from a failure to enter into the requested contract. Therefore, there existed a degree of compulsion which necessitated a defense.

We disagree with the conclusion of the court of appeals. Though the tone of the correspondence may be termed confrontational, neither the EPA's PRP letters nor the DNR letters *by themselves* impose liability. Also, if the City or ES&G failed to respond to the letters, that failure alone would not authorize the assessment of fines. Instead, something more in the form of a court proceeding would be required to "*force or compel* the insured to take action or suffer serious consequences." *See Professional Rental v. Shelby Ins.*, 75 Ohio App. 365, 375, 599 N.E.2d 423, 430

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[26]In *Ryan*, the court noted that the owner of a contaminated site had a somewhat desultory correspondence with the New York Department of Environmental Conservation regarding the closure and cleanup of the affected site. Ryan sued his insurer, Royal Insurance, for failure to defend and indemnify under the policies. At issue was whether the correspondence between Ryan and the Department of Conservation, regarding contamination and cleanup, was the functional equivalent of a suit sufficient to trigger the insured's duty to defend.

(1991) (emphasis in original). For example, the EPA could issue, and then seek to have enforced, an administrative order pursuant to 42 U.S.C. sec. 9606(a) or 9604(e)(5)(A);[27] it could seek an injunctive order in federal district court under 42 U.S.C. sec. 9606(a);[28] or it could initiate a cost recovery action under 42 U.S.C. sec. 9607.[29] *Id.* Indeed, the February 8, 1991, letter from the DNR stated that if the City and ES&G did not sign the proposed contract and the site

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[27]Though the EPA encourages voluntary participation in the cleanup and remediation efforts by means of PRP notification letters, it is authorized under 42 U.S.C. sec. 9606(a) to issue administrative orders to compel a PRP to clean up a site. The EPA may negotiate the administrative order with the PRP; if successfully done, it becomes a binding consent order. If the negotiations fail, the EPA may then unilaterally develop the administrative order, which has the effect of accelerating compliance, since a fine of $25,000 is imposed for each day the PRP does not comply. 42 U.S.C. sec. 9606(b)(1)

[28]Under 42 U.S.C. sec. 9606(a), the EPA may seek an injunctive order, through the Department of Justice, in order to compel a PRP to comply with the cleanup plan.

[29]If a PRP decides not to respond to the PRP letter or does not participate in cleanup operations, the federal government may, under CERCLA, use Superfund money to clean up the site and then seek reimbursement from any responsible party. *See* 42 U.S.C. secs. 9604(a)(1) and 9607(a).

Again, the legislative bias in CERCLA is to seek voluntary settlement and cleanup. However, the EPA may also force the government to order a cleanup, or request the government to unilaterally implement cleanup, followed by litigation wherein reimbursement is sought. *See Professional Rental*, 75 Ohio App. at 373-74, 599 N.E.2d at 428-29.

was listed on the NPL, primary responsibility for cleanup activities would shift to the EPA. If that had occurred, then the EPA administrative orders may come into play. Prior to that time, the DNR offered the City and ES&G options under which all concerned parties might cooperate in order to clean up and remediate the landfill.[30] None of the options offered by the DNR rose to the level of a court proceeding.

If the EPA's conduct in sending the PRP letter or the DNR's letter requesting site remediation is construed as initiating a "suit seeking damages," the duty to defend would

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[30]The court in *Professional Rental* noted the following regarding PRP notifications:

> The CERCLA notification process is clearly not analogous to the traditional means of bargaining and settlement. 'Settling' with the EPA primarily involves formulating an acceptable proposal for cleaning up the pollution under the assumption of PRP liability. Although the EPA designates recipients as 'potentially responsible parties,' it is not the equivalent of a conventional demand letter or a simple accusation of fault. First, PRP notifications are sent after the EPA has established that 'there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA.' Superfund Program, 53 F.R. at 5301. Second, parties who are simply 'identified' as responsible under Section 107(a) are strictly liable, regardless of fault. The only defense (other than an act of God or war) is the limited defense of 'due care' provided in CERCLA Section 107(c)(3)....

Professional Rental, 75 Ohio App. at 374, 599 N.E.2d at 429.

be mandated under the terms of the policy. Such a result would create a duty for the insurer for which it had not contracted.[31] This court has stated that a primary goal in interpreting insurance policies is to ascertain and carry out the true intentions of the parties. *See Kremers-Urban Co. v. American Employers Ins.*, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). As a result, the words of a policy are to be given their plain and ordinary meaning. *Id.* The meaning of the terms of the policy is assessed by a

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[31]More importantly, it is an obligation for which an insurer may not be prepared. Typically, insurers assess the extent of the risks insured under policies issued. The risk of liability may then be spread among groups of insureds and premiums assigned only after the extent of the risk is determined. The original risk assessment becomes a nullity if the language of the policy is redefined in order to expand coverage beyond what was planned for the insurer in the contract of insurance. Policies of insurance, premised upon a certain level of predictability and assessment of risk at the time of contracting, lose their effect without the inclusion of certain basic definitions. *See Whether Insurers Must Defend*, 10 Ill. U.L. Rev. at 595; Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory, and Public Policy* 103 (1986); 2 *Couch on Insurance 2d* sec. 15:4 (2d ed. 1984); *U.S. Fidelity and Guar. v. Star Fire Coals, Inc.*, 856 F.2d 31, 33 (6th Cir. 1988) (insurers need to rely on policy language in order to efficiently manage risks) (citing *United States Fire Ins. v. Kentucky Truck Sales*, 786 F.2d 736, 739 (6th Cir. 1986) ("[T]he court must give all terms their plain meanings and *not rewrite an insurance contract to enlarge the risk.*) (Emphasis added.)

As noted earlier, CGLs were formulated and revised between 1940 and 1973. Risk assessment in pre-1980 CGLs did not incorporate liability under CERCLA. Therefore, potential liability was not spread among polluting insured. *Whether Insurers Must Defend*, 10 N. Ill. U.L. Rev. at 596; Hapke, *Federal Circuit Court Decisions Contaminate Superfund Policy*, 19 Envtl. L. Rep. 10393 (1989).

reasonable person in the position of the insured and that reasonable insured's expectations of coverage. *Id.* However, an insured's expectations may not be satisfied in contradiction to policy language which clearly identifies the scope of the insured's coverage. Thus, "[w]here the parties have contracted to limit recovery to a specific quantifiable type of remedy, a court should not alter the insurance contract to include other types of remedies not contracted for by the parties and that may not be presently quantifiable." *Shorewood School Dist.*, 170 Wis. 2d at 369.

We find no ambiguity in the term "suit" as it has been used in the insurance policies. "Suit" denotes court proceedings, not a "functional equivalent." The dissent believes that a reasonable policyholder would view letters from a federal or state agency advising an insured of liability as a "suit." To the contrary, the word "suit" is easily understood and unambiguous to a reasonable policyholder. The proof is in the decisions that hold that a "PRP letter" is the "functional equivalent of a suit." Either there is a suit or there is not. When there is no suit, there is no duty to defend. Therefore,

> [t]o determine whether a duty to defend exists, the complaint claiming damages must be compared to the insurance policy and a determination made as to whether, if the allegations are proved, the insurer would be required to pay the resulting judgment. The insurer need only look at the allegations within

> the four corners of the complaint to make such a determination.

Id. at 364-65.

Construing either the EPA's PRP letter or the DNR letters as the "functional equivalent of a suit" would be contrary to present Wisconsin insurance law since (a) the insurer would have to look beyond the four corners of the complaint in order to assess whether a potentially covered claim exists, and (b) the insurer would be put in the position of anticipating a coverage expectation for which it did not contract or receive payment. In this case, no complaint has been filed which would initiate a suit and invoke the insurers' duty to defend.[32] Therefore, no matter how coercive the language of the DNR letter was considered to be, it was used within the realm of an *administrative* proceeding. It did not have the effect of initiating a suit.

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[32]*See also Reliance Ins. v. Royal Motorcar Corp.*, 534 So. 2d 922, 923 (Fla. Dist. Ct. App. 1988) (an insurer's duty to defend is determined solely by the complaint's allegations); *American Alliance Ins. v. Frito-Lay*, 788 S.W.2d 152, 153-54 (Tex. Ct. App. 1990) (there must be an examination of the allegations in the complaint to determine if a duty to defend exists); *Viking Ins. Co. of Wisconsin v. Hill*, 57 Wash. App. 341, 787 P.2d 1385 (1990) (the duty to defend is determined by a review of the allegations on the face of the pleading which gave rise to the covered action); and *Grieb v. Citizens Casualty Co.*, 33 Wis. 2d 552, 557, 148 N.W.2d 103 (1967) (whether a third-party suit comes within a defense-coverage clause depends upon the allegations in the complaint).

CERCLA SUPERFUND RESPONSE COSTS DO NOT CONSTITUTE DAMAGES

Standard CGL policy language requires a duty to defend a suit seeking damages, which, if proved, would give rise to recovery under the terms and conditions of the policy. *Elliott*, 169 Wis. 2d at 320-21. The insurer has to defend suits against the insured requesting recovery for sums that the insured may become legally obligated to pay *as damages*. The *as damages* qualifier appears in the policies at issue in the bodily injury, property damage, and personal injury coverages. However, contrary to the conclusion of the court of appeals, the CGL policies in this case do not provide coverage for Superfund response costs, since such costs do

not constitute damages.[33] Additionally, the parties did not

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[33]42 U.S.C. sec. 9607(a) states in pertinent part:

> (4) [A] person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> > (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; ... [and]
> >
> > (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release....

It should be noted that the National Contingency Plan is developed under CERCLA by the EPA. The plan establishes procedures for the cleanup of hazardous waste sites.

When dealing with the issue of damages, courts have disagreed as to whether a CGL policy's reference to "damages" includes cleanup costs, such as at issue in this case. Courts which interpret "damages" more broadly conclude that coverage includes claims brought under either sec. 9607(a)(4)(A) or (C). *See* Kristin A. Kolesar, Note, *Insurance Coverage for CERCLA Claims Under Comprehensive General Liability Policies: Cleaning Up Hazardous Waste in the Legal Environment*, 68 Notre Dame L. Rev. 549, 553-54 (1993) [hereinafter *Insurance Coverage for CERCLA Claims*].

contract for such coverage.

In *Shorewood School Dist.*, this court stated that "'[d]amages' as used in ... insurance policies unambiguously means legal damages. It is legal compensation for past wrongs or injuries and is generally pecuniary in nature. The term 'damages' does not encompass the cost of complying with an injunctive decree." *Shorewood School Dist.*, 170 Wis. 2d at 368. Further, this court stated that the

> limited construction of the term 'damages' is consistent with the basic grant of coverage in the insurance policies. The insurers agree to pay 'all sums which the insured shall become legally obligated to pay *as damages.*' The insurers did not agree to pay '*all sums* which the insured shall be come legally obligated to pay.' The addition of 'as damages' serves as a qualifier, a limit to coverage.

Id. at 369-70 (emphasis in original). Consistent with conclusions of other courts, this court has concluded that if the term "damages" is given a broader or more expansive interpretation, the phrase "as damages" would be rendered mere surplusage, since any expenses prior or incidental to litigation would be covered by the policies. *Id. See also Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied* 484 U.S. 1008 (1988) ("[i]f the term 'damages' is given the broad, boundless connotations sought by the [insured], then the term 'damages' in the contract ... would become mere surplusage, because any obligation to pay would be covered...."); *Continental Ins. v. Northeastern Pharmaceutical*, 842 F.2d 977 (8th Cir. 988), *cert. denied*

sub nom. Missouri v. Continental Insurance Cos., 488 U.S. 821 (1988) (Northeastern's CGL policies did not provide coverage for reimbursement of response costs under CERCLA; the phrase "as damages" is not ambiguous, since the plain meaning of the term as used in the insurance context refers to legal damages and not equitable monetary relief).

Response costs assigned either under CERCLA or secs. 144.442(8) and (9), Stats., are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C). *See Insurance Coverage for CERCLA Claims*, 68 Notre Dame L. Rev. at 561. Indeed, the federal government has stated that

> [n]atural resource damage assessments are not identical to response or remedial actions addressed by the larger statutory scheme of CERCLA.... Assessments are not intended to replace response actions, which have as their primary purpose the protection of human health, but to supplement them, by providing a process for determining proper compensation to the public for injury to natural resources.

51 Fed. Reg. 27,674 (1986); *Insurance Coverage for CERCLA Claims*, 68 Notre Dame L. Rev. at 561 n. 76. Therefore, as an equitable form of relief, response costs were not designed to compensate for past wrongs; rather, they were intended to deter any future contamination by means of

injunctive action, while providing for remediation and cleanup of the affected site. This type of relief is distinct from that which is substitutionary--monetary compensation provided to make up for a claimed loss. *Shorewood School Dist.*, 170 Wis. 2d at 369. Although the dissent takes the position that the insurers should be responsible for the response costs, the insurers never assumed a contractual responsibility to pay to remove hazardous materials and to prevent future harm.

Finally, CERCLA expressly permits PRPs to insure against the type of costs imposed under this legislation. 42 U.S.C. sec. 9607(e)(1) states:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

However, the CGL at issue in this case did not by its terms provide for such coverage. We examine only the terms of the policies for which the parties initially contracted.

In conclusion, we hold that General Casualty and Aetna do not have a duty to defend against the actions of the EPA and the DNR, requesting environmental cleanup,

because no suit seeking damages has been filed against the insureds. Accordingly, we affirm in part and reverse in part the decision of the court of appeals and remand to the circuit court with directions to deny the motion for summary judgment of the City and ES&G and to enter summary judgment on behalf of General Casualty and Aetna.

By the Court. --The decision of the court of appeals is affirmed in part and reversed in part, and the cause is remanded to the circuit court with directions.

SHIRLEY S. ABRAHAMSON, J. *(dissenting)*. CERCLA environmental clean-up cases involve "one of the largest and most costly areas of civil litigation." 7A Appleman, Insurance Law and Practice, sec. 4520, p. 126 (1993 Supp.). The court's decision determines who will pay the costs of environmental clean-up in Wisconsin--the insureds or the insurance companies. Courts across the country have divided on the complex legal questions behind this very practical problem.

I conclude, as did the circuit court, a unanimous panel of the court of appeals, and the majority of state and federal courts which have decided similar cases[1] that the insureds

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[1]As I previously stated, the courts are divided. I rely on secondary material for surveys of the federal and state court decisions to determine the majority rule. According to these sources, a slim majority of the courts have held that the policy imposes a duty to defend following receipt of a PRP letter; a larger majority apparently concludes that response costs are damages under the policy. For surveys of the cases, *see, e.g.*, Kenneth H. Mack, *Insurance Coverage of Environmental Claims*, Practicing Law Institute (April-May 1993) at 4 (Westlaw citation: 459 PLI/Lit 261, PLI Order No. H4-5152; Database

are covered by the insurance policies. The very well written court of appeals decision, *City of Edgerton v. General Cas. Co.*, 172 Wis. 2d 518, 493 N.W.2d 768 (Ct. App. 1992), carefully reviews the numerous cases and authorities. It does not need to be amplified by this dissent. I write briefly to explain where, in my opinion, the reasoning of the majority opinion falters.

I.

The majority opinion holds that the insurance company's duty to defend a "suit" arises only on the commencement of an action in a court of law. I conclude that the majority's interpretation of the word "suit" as used in the policy is erroneous and that the duty to defend may be prompted by administrative action. Because the majority concludes that "suit" is limited to a court action, I need not address, as did the court of appeals, which step in the administrative process triggers the duty to defend.

First, the majority's interpretation contravenes the general rules applicable to contract interpretation that the objective of interpreting the policy is to ascertain and carry out the intention of the parties. Words in a policy must be given their plain and ordinary meaning; they must be

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JLR); Barry R. Ostrager, *Special Insurance Coverage Issues Arising out of Hazardous Waste/Environmental Clean-Up Litigation*, American Law Institute (June 21, 1993) at 25-35, 40-48 (Westlaw citation: C855 ALI-ABA 1005; Database JLR); Mary Kay Vyskocil, *Environmental Coverage Litigation: An Overview of Trends and Developments Practicing Law Institute* (January-February 1993) at 6-11, 18-24 (Westlaw citation: 454 PLI/Lit 443, PLI Order No. H4-5148; Database JLR).

interpreted to mean what a reasonable person in the position of the insured would have understood them to mean.

The majority opinion states in a conclusory fashion that "suit" denotes court proceedings. While one dictionary definition of "suit" is an action in court, the dictionary also gives the word the broader meaning: "the attempt to gain an end by legal process: prosecution of right before any tribunal: litigation." Webster's Third New International Dictionary (1986) 2286.[2] Thus suit, according to a dictionary or real life, is not limited to proceedings in court.

While courts frequently duel with dictionary definitions, many of which are circular, the real point is that the dictionaries show multiple meanings for the word "suit" and that a reasonable understanding of the word "suit" is not limited to an action filed in court.

From the point of view of a reasonable policy holder, official letters from a federal or state agency advising an insured of liability, with increasing penalties if the insured

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[2]When I examine the dictionary definitions of "process" and "litigation," they too have multiple meanings. "Process" is defined as "the course of the procedure in a judicial action or in a suit in litigation: legal action." Webster's Third New International Dictionary (1986) 1808. "Litigation" is defined as "the practice of taking legal action" and also as "a controversy involving adverse parties before an executive governmental agency having quasi-judicial powers and employing quasi-judicial procedures." Webster's Third New International Dictionary (1986) 1322. While a court would not ordinarily examine a law dictionary, as the majority does, to determine what an objectively reasonable policyholder would have understood the policy to mean, the legal definition of "suit" is similar to Webster's.

does not respond, appear to be an adversary's attempt to gain an end by a legal process. Such administrative proceedings may force the insured to hire technical experts and lawyers to protect its interests and may terminate in an action in court. Thus to the insured an administrative action is as coercive a legal process as an action filed in a court of law.

While the word "suit" may have several meanings, semantics make little difference to an objectively reasonable insured in the face of the myriad types of liability that might result from administrative proceedings. The only meaning of the word "suit" in the insurance policy which comports with an insured's objectively reasonable expectations is that it signifies either a court action or an attempt to gain an end by a legal process.

Second, the majority's narrow interpretation of the word "suit" to mean an action commenced in court is neither reasonable nor wise because it fosters litigation. The policy behind CERCLA is to encourage prompt and voluntary clean-up of toxic waste. The antipollution statutes offer the insured incentives to cooperate with the government rather than awaiting a court proceeding. If, as the majority opinion holds, the administrative action does not activate the duty to defend, the insured may refuse to cooperate with the government in order to force the government to file a formal complaint. An interpretation of the policy that encourages an insured not to cooperate with governmental agencies and fosters litigation in lieu of alternative dispute resolution is, on its face, unreasonable.

Third, an examination of the statutory proceedings demonstrates that administrative enforcement is part of

litigation. The government has discretion about the type of action to use to combat pollution. By choosing a more expensive option the government can adversely affect the insured's rights. Because damages might be determined before the parties ever get to court, the need for representation is thus perhaps greatest at the administrative level and the administrative process is obviously part of the litigation process which triggers the obligation to defend. *Avondale Industries, Inc. v. Travelers Indem. Co.*, 697 F. Supp. 1314, 1320-22 (S.D. N.Y. 1888), *aff'd*, 887 F.2d 1200 (2d Cir. 1989), *reh'g denied*, 894 F.2d 498 (2d Cir. 1990), *cert. denied*, 496 U.S. 906 (1990). *See also, e.g., Lindas v. Cady*, 183 Wis. 2d 547, _____, 515 N.W.2d 458 (1994), concluding that unreviewed agency determinations may have preclusive effect in court.

Fourth, according to the majority, because our cases state that a court looks to the complaint to determine whether a potentially covered claim exists, the word "suit" must refer to a lawsuit. Majority opinion at _____. These cases, however, do not have anything to do with the case at bar. In all of them, an action in court was in fact filed. These cases can not be used to say that there is no duty to defend unless an action in court is commenced.

Finally, it seems to me that the majority's interpretation of the word "suit" in the context of an insurer's duty to defend is antiquated. In our modern legal world many forms of liability are determined outside the courtroom. This court has by rule enabled trial courts to resolve disputes without clogging the dockets of our trial and appellate court. By creating administrative mechanisms to encourage prompt, voluntary, and efficient environmental clean-up, the state and

federal legislatures have attempted to resolve a major societal problem without resorting to the courts. By clinging to an outmoded definition of the term "suit," the majority defeats this legislative policy.

For the reasons set forth, I agree with the numerous cases that hold that when the government assumes an adversarial posture and makes clear that governmental force will be used with probable and imminent financial consequences, a suit is in progress and the insured might reasonably expect the insurance company to defend.

II.

Although the majority opinion concludes that the insurance company has no obligation at this stage of the administrative proceedings, it nevertheless goes on to hold that response costs do not constitute damages under the policy. I address this damage issue because it is the only damage issue the majority discusses. Again, I conclude, as did the circuit court, a unanimous panel of the court of appeals, and the majority of courts that have considered the issue, that response costs are damages under the policy. The majority opinion's interpretation of the word "damages" in the policy relies heavily on *School District of Shorewood v. Wausau Ins. Co.*, 170 Wis. 2d 347, 488 N.W.2d 82 (1992), and is unpersuasive.

First, the majority opinion applies the *Shorewood* discussion of damages to this CERCLA case in a summary fashion, ignoring the language in the *Shorewood* decision by which the court expressly declined to analogize that case to CERCLA cases defining the word "damages." The

Shorewood court stated: "The issue of whether clean-up costs constitute 'damages' under the terms of an insurance contract has never been addressed by a Wisconsin court. Such an important issue should not be decided in a cursory fashion by this court. Therefore, we decline to adopt or apply the analogy posited by the school districts." *Shorewood*, 170 Wis. 2d at 374.

Second, were the majority opinion to follow the *Shorewood* rationale to its logical conclusion, it would have to hold that the response costs in this case were damages within the meaning of the policy. The *Shorewood* court's dissection of the word "damages" in a comprehensive general liability policy rests on the analysis of "damages" by Professor Dobbs, whom the court characterized as "a noted authority on remedies." *Shorewood*, 170 Wis. 2d at 368. The *Shorewood* court quoted extensively from Professor Dobbs' 1973 Handbook on the Law of Remedies. *Shorewood*, 170 Wis. 2d 368-69.

In his more recent 1993 revision of his book, Professor Dobbs concludes that response costs under CERCLA cases are "analogous to repair costs and ... common law consequential damages.... Response costs are very high, but in spite of the terminology, they closely resemble familiar common law types of damages." Handbook on the Law of Remedies 727 (1993). Thus adherence to *Shorewood* and its reliance on Professor Dobbs lead to the conclusion that response costs are damages under the standard form policy involved in this case.

For the reasons set forth herein and in the decision of the court of appeals, I dissent.

I am authorized to state that Chief Justice NATHAN S. HEFFERNAN and Justice WILLIAM A. BABLITCH join in this dissent.

No. 91-1408

STATE OF WISCONSIN COURT OF APPEALS
DISTRICT IV

CITY OF EDGERTON,
AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents,

v.

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant-Appellant,

WISCONSIN INSURANCE SECURITY FUND,

Defendant,

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Co-Appellant,

HANOVER INSURANCE COMPANIES,
WAUSAU INSURANCE COMPIES,
AND LOCAL GOVERNMENT PROPERTY
INSURANCE FUND,

Defendants.

COURT OF APPEALS DECISION DATED AND RELEASED November 25, 1992

APPEAL from a judgment of the circuit court for Rock County; JOHN H. LUSSOW, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Sundby, Cane and LaRocque, JJ.

SUNDBY, J. Edgerton Sand & Gravel, Inc. (ES&G) owns a landfill site in Rock county which it closed December 30, 1984. During 1984 and 1985 it capped the landfill. The city of Edgerton leased the site for a municipal landfill from approximately 1968 to 1984. In 1984 volatile organic compounds (VOCs) were detected in the groundwater under and in the vicinity of the site.

By certified letter dated June 22, 1989, the United States Environmental Protection Agency (EPA), pursuant to section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] [42 U.S.C. § 9604(3)], informed ES&G and the city that it was investigating the circumstances surrounding the presence of hazardous substances in and around the ES&G site. EPA requested that ES&G, the city, and other potentially responsible parties (PRPs) respond to the Wisconsin Department of Natural Resources (DNR) with detailed information as to the disposal of hazardous substances at the

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[1]Codified, as amended, at 42 U.S.C. §§ 9601-9675 (1988), commonly referred to as Superfund.

site from 1950 to 1984.[2] On July 7, 1989, the city forwarded EPA's letter to its insurer, General Casualty Company of Wisconsin, and advised: "[w]e are insisting that you accept tender of coverage immediately and ... request that you retain independent expert counsel for the City of Edgerton to represent the City in this matter."

General Casualty also insured ES&G against liability for property damage and personal injury arising out of its ownership and use of the landfill.[3] On July 20, 1989,

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[2]EPA's letter stated:

> The United States Environmental Protection Agency (U.S. EPA) is presently investigating the circumstances surrounding the presence of hazardous substances in and around the Edgerton Sand & Gravel Site in Rock County....
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> Pursuant to the authority of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. [sec.] 9604(e), amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 [SARA], and pursuant to Section 3007 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. [sec.] 76927, you are hereby requested to respond to the following Information Requests. Compliance with the following Information Requests is mandatory....

[3]General Casualty provided primary general liability coverage of the landfill to ES&G for the policy periods January 1, 1984, to January 1, 1985 and January 1, 1985, to January 1, 1986. It provided primary general liability coverage to the city for the policy year beginning April

ES&G forwarded EPA's letter to General Casualty and requested that it provide ES&G with defense coverage and pay any costs ES&G "may have regarding this site."

By certified letter dated February 27, 1990, DNR gave the PRPs thirty days to propose a PRP-implemented remediation work plan to clean up the site and remediate the environmental problems associated with the site, or face listing of the site on CERCLA's National Priorities List (NPL), or state action.[4] On April 23, 1990, ES&G notified its excess liability insurer, Aetna Casualty and Surety Company, that ES&G had received EPA's Information Request letter and DNR's enforcement letter of February 27, 1990. ES&G requested that Aetna accept coverage of defense costs and any liability ES&G might incur as a result of EPA's and DNR's potential claims. General Casualty and Aetna denied coverage and refused to provide ES&G and the city with a defense.

1, 1982, and each year thereafter to April 1, 1986. However, ES&G and the city agree that General Casualty's policies commencing after 1984 do not provide coverage. Iowa National Mutual Insurance Company provided ES&G with primary comprehensive general liability coverage from January 1, 1973, to January 1, 1984, and the city with primary comprehensive general liability coverage from April 1, 1977 through April 1, 1981. However, Iowa National is insolvent. Aetna provided ES&G with excess indemnity (umbrella) coverage from April 9, 1974, to April 9, 1977. It did not cover the city at any time.

[4]A work plan was not prepared until July 1991. FOTH AND VAN DYKE, WORK PLAN FOR LANDFILL CLOSURE AND GROUNDWATER REMEDIAL INVESTIGATION/FEASIBILITY STUDY (July 11, 1991), filed with DNR, Southern District Headquarters.

ES&G and the city began this action December 20, 1990, seeking a declaration that General Casualty and Aetna were obligated under their policies to defend them against, and indemnify them for, any liability arising out of EPA's and DNR's claims, actions or suits involving the landfill. ES&G and the city also stated a claim against General Casualty and Aetna for bad faith in refusing to provide them with a defense.

ES&G and the city filed a motion for summary judgment on March 26, 1991. On April 26, 1991, General Casualty filed a cross-motion for summary judgment claiming that no "suit seeking damages" had been filed which triggered its duty to defend. It further contended that the insureds' failure to give it timely notice of an "occurrence" or claim, as required by its policies, relieved it of any obligation to provide its insureds with coverage under its policies. It also requested that the trial court dismiss the insureds' bad faith claim. On April 29, 1991, Aetna filed a substantively identical cross-motion for summary judgment. In the alternative, General Casualty and Aetna each moved the trial court for a continuance to permit it to conduct additional discovery.

On May 10, 1991, the court granted ES&G's and the city's motion for summary judgment and denied General Casualty's and Aetna's cross-motions, except on the insureds' bad faith claims, which it dismissed. The court did not rule on General Casualty's and Aetna's motions for a continuance.[5]

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[5]Our decision moots General Casualty's and Aetna's claim that the trial abused its discretion when it failed to address their motions.

On July 18, 1991, the circuit court entered an amended judgment. General Casualty and Aetna appealed. ES&G and the city do not appeal from that part of the judgment which dismissed their bad faith claim. We affirm that part of the judgment which denied General Casualty's and Aetna's cross-motions for summary judgment and reverse that part of the judgment which granted ES&G's and the city's motion for summary judgment. We also reverse the judgment in favor of the city against Aetna because Aetna does not insure the city.

THE ISSUES

When confronted with cross-motions for summary judgment, the reviewing court must rule on each party's motion on an individual basis. Each motion must be denied if material factual issues exist as to the motion. 10A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2720 (2d ed. 1983). In most respects, Wisconsin's summary judgment statute, sec. 802.08, Stats., is substantially the same as Rule 56, Fed. R. Civ. P., which governs summary judgment procedure in the federal district courts. We conclude that this construction of the federal rule is consistent with Wisconsin summary judgment methodology. We, like the federal appellate courts, review the trial court's decision by applying, just as the trial court applied, the standards and methods set forth in the summary judgment rule. *Wright v. Hasley*, 86 Wis. 2d 572, 579, 273 N.W.2d 319, 322-23 (1979).

We identify the following issues presented by the parties' motions and cross-motions:

(1) Did issuance of the June 22, 1989 PRP letters by EPA to ES&G and the city under section 104(e) of CERCLA trigger the duty of General Casualty and Aetna to defend their insureds against the Superfund initiative?[6] We conclude that the insurers' duty to defend was not triggered by the PRP letters of June 22, 1989, but arose when DNR's letter of February 27, 1990, unequivocally imposed upon ES&G and the city the responsibility to remediate and clean up the landfill or bear the expense thereof.[7]

(2) Are clean-up and remediation costs, which ES&G and the city incur in response to the Superfund initiative, sums which they are obligated to pay "as damages," within the meaning of that term as used in the insurers' policies? We conclude that they are.

(3) Do the personal injury liability coverage provisions of General Casualty's and Aetna's policies provide coverage for ES&G's and the city's liability for groundwater contamination? We conclude that "personal injury," as defined in General Casualty's and Aetna's policies, includes injury to the groundwater.

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[6]In this opinion, "Superfund initiative" refers to the administrative proceedings begun by EPA's section 104(e) CERCLA letter and includes DNR's environmental repair efforts under secs. 144.442 and 144.442(8), Stats. Under sec. 144.442(8), DNR may advise, consult, assist and contract with any interested person to implement the federal Superfund Act. It may also contract directly with EPA.

[7]When we refer to clean up or remediation of the landfill or the site, we include the environmental problems associated with the site which may have been, or are, encountered off-site.

(4) Do General Casualty's policies exclude coverage because ES&G and the city expected or intended that contaminants would leach into the groundwater from the landfill? We conclude that General Casualty's basic policy's "expected" or "intended" exclusions do not apply to personal injury liability coverage under Coverage P, applicable to ES&G, or to the Broad Form Extended Liability Coverage Endorsement, applicable to the city. Because coverage of groundwater contamination is provided under the personal injury liability coverage provisions, we need not consider whether coverage for property damage liability is excluded by provisions of General Casualty's basic policy.

(5) Was coverage under the insurers' policies triggered during a policy period? Because the question of the appropriate trigger of coverage for personal injury liability has not been briefed and the need to answer that question may be obviated by the evidence at trial, we do not reach this issue.

(6) Is the cost of cleaning up and remediating the landfill site itself excluded from coverage under the policies' owned-property exclusion? We conclude that where, as here, the purpose of remedial work on the insured's property is to repair or prevent environmental damage, the cost of such work is not excluded by the owned-property exclusion.

(7) Is any party entitled to summary judgment on the question of whether General Casualty and Aetna were prejudiced by the insureds' untimely notice of an "occurrence" or claim? We conclude that there is a genuine issue of material fact as to whether General Casualty and Aetna were prejudiced by ES&G's and the city's untimely

notices, which precludes the grant of summary judgment to any party.

(8) Has the policy limit of Iowa National's underlying policy been exhausted by payments by ES&G so that Aetna's duty to defend has been triggered? Did ES&G and the city attempt to insure a known loss when they contracted with General Casualty? We conclude that these are issues for trial.

I.

SUPERFUND INITIATIVE AS "SUIT"

General Casualty's policies[8] provide: "[T]he company shall have the right and duty to defend any *suit* against the insured *seeking damages* on account of ... bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent...." (Emphasis added.) Coverage P for Personal Injury Liability, contained in ES&G's policy and General Casualty's Broad Form Extended Liability Coverage Endorsement for personal injury liability applicable to the city, contain substantively identical

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[8]General Casualty's policies are standard-form comprehensive general liability (CGL) insurance policies developed for the insurance industry by the Insurance Services Office and its predecessor agencies. For a general discussion of the development of CGL policies, see 7A JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE, § 4491 (1979 & Supp. 1991); *see also* MITCHELL L. LATHROP, INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS ch. 3, General Liability Insurance (1992) (hereinafter ENVIRONMENTAL CLAIMS INSURANCE). Aetna's excess liability policy differs in some material respects from the standard-form CGL.

language. Aetna's policy provides: "The company shall defend any *suit seeking damages* which are not payable on behalf of the insured ... because of exhaustion of an underlying aggregate limit of liability by payment of claims...." (Emphasis added.)

General Casualty and Aetna argue that the Superfund process did not commence a "suit" against their insureds because the term "suit" "[i]n plain language refers to court proceedings."[9] The traditional view is that a mere claim against the insured is insufficient to trigger the duty to defend. Thomas A. Gordon and Roger Westendorf, *Liability Coverage for Toxic Tort, Hazardous Waste Disposal and Other Pollution Exposures*, 25 IDAHO L. REV. 567, 609 (1988-89). The authors state:

> Until a "suit" was filed, the courts were reluctant to recognize an obligation by the insurer to defend. More recent decisions, however, have broadened the word "suit" to include any adjudicatory proceeding before an administrative or quasi-judicial forum. *Courts considering the issue of whether a notice letter to PRPs from a federal or state regulatory agency pursuant to environmental statutes*

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[9]The Insurance Services Office's Occurrence-Commercial General Liability policy, effective January 1, 1986, which replaced the standard-form CGL policy, defines "suit" to "mean[] a civil proceeding in which damages ... to which this insurance applies are alleged...." DONALD S. MALECKI AND ARTHUR L. FLITNER, THE NEW CLAIMS-MADE AND OCCURRENCE FORMS, COMMERCIAL GENERAL LIABILITY 11-12 (2nd ed. 1986).

> *triggers the existence of a duty to defend have reached opposite conclusions.*

Id. at 609-10 (citations omitted; emphasis added).

Those courts which have held that a duty to defend is not triggered by federal or state administrative environmental initiatives have applied to the word "suit" a "plain language" rule. Representative of the decisions of those courts is *Arco Indus. Corp. v. Travelers Ins. Co.*, 730 F. Supp. 59 (W.D. Mich. 1989). There, the court said:

> In this case, the insurance contract limits the duty to defend to those instances where the insured is the subject of a "suit." While the contracts do not define the term "suit," that term has a well-accepted ordinary meaning. In plain language, the term refers to court proceedings.

Id. at 66.[10]

The "plain-language" courts frequently cite a dictionary definition of "suit": "an action or process in a

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[10]The federal court for the Eastern District of Michigan predicted that the Michigan Supreme Court would arrive at a contrary conclusion. *Higgins Indus., Inc. v. Fireman's Fund Ins. Co.*, 730 F. Supp. 774, 776-77 (E.D. Mich. 1989). However, the Sixth Circuit Court of Appeals predicted that the Michigan Supreme Court would conclude that a PRP letter does not trigger an insurer's duty to defend. *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 762-64 (6th Cir. 1992). The court held that "suit" had a plain and unambiguous meaning that excluded the PRP letter in that case.

court for the recovery of a right or claim." *A.Y. McDonald Indus. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 627 (Iowa 1991) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2286 (P. Gove ed. 1961)). Other courts, however, have pointed out that "suit" has a second, broader meaning: "the attempt to gain an end by a legal process." *Id.* *McDonald* lists decisions which have given "suit" a broad definition, and other decisions which have adopted a narrow definition. *Id.* at 627-28 nn. 9-10. Those courts which have interpreted "suit" broadly have considered that proceedings under both federal and state antipollution laws may be lengthy and complex, and government policy is to accomplish cleanup quickly and without judicial intervention if possible. Annotation, *Liability Insurance Coverage for Violations of Antipollution Laws*, 87 A.L.R. 4th 444, §2(b) (1991 Supp. 1992).

We disagree with those courts which have found that the word "suit," contained in the standard-form CGL policy, unambiguously requires the initiation of court proceedings before the duty to defend is triggered. We also disagree with those courts which hold that the mere receipt of a PRP letter from EPA or a state environmental protection agency causes the duty to defend to arise. We conclude that the duty to defend arises when a federal or state environmental agency identifies a PRP which it unequivocally requires to pay the cost of, or participate in paying the cost of, landfill remediation and clean up. We adopt the reasoning of the court in *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731 (1st Cir. 1990).

In *Ryan*, the owner of a site contaminated by hazardous chemicals had what the court termed "somewhat

desultory correspondence" with the New York Department of Environmental conservation regarding closure and cleanup of the site. It sued its insurer, Rural Insurance, for Rural's failure to defend and indemnify it according to the tenor of a series of insurance policies. The court said that the issue was whether the New York Court of Appeals would treat this correspondence as the functional equivalent of a "suit" sufficient to trigger the duty to defend under the policies. The court concluded that it would not. It concluded that an insurer's duty to defend would be determined according to the following principles:

> To sum up, the origins and purpose of the duty to defend seem best accommodated neither by a restrictive suit-cum-judgment rule nor by an expansive "any contact with a government agency is enough" rule, but by focusing instead on the data most relevant to the probability of actual toxic waste liability: coerciveness, adversariness, the seriousness of the effort with which the government hounds an insured, and the gravity of imminent consequences. Since the law holds PRPs to so strict a liability standard, the degree of compulsion the government wields in pursuing an insured seems an apt proxy for measuring

> factual expectancy according to the actual probability and immediacy of toxic waste liability.

Id. at 741.[11]

General Casualty and Aetna argue that EPA exerted no compulsion by its PRP letter of June 22, 1989,[12] and that DNR's letters were merely invitations to voluntary action. We agree that EPA's Information Request letter of June 22, 1989, did not trigger a duty to defend. Such requests under section 104(e) of CERCLA are, as its title states, "Information Gathering." However, EPA and DNR proceeded beyond the "information gathering" stage. On November 6, 1989, DNR forwarded to ES&G the responses the department received to the section 104(e) letter "as an opportunity for you and the other potentially [responsible] parties to reach an agreement between yourselves on remediating the environmental problems at the landfill."

On February 27, 1990, DNR notified ES&G by certified letter that, "[A] legally enforceable contract between the Department and the PRP's must be signed within 60 days after a PRP workplan is submitted to the Department, to

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[11]*Ryan* was followed in *Colonial Tanning Corp. v. Home Indem. Co.*, 780 F. Supp. 906 (N.D.N.Y. 1991).

[12]General Casualty also claims that there is nothing in the record to show that the city received EPA's letter. General Casualty is wrong. Mary Harding, an attorney representing the city, incorporated in her affidavit the city attorney's letter of July 7, 1989, to General Casualty specifically referring to and enclosing a copy of EPA's June 22 letter.

ensure that the work is completed properly and on schedule." Immediately thereafter, on March 9, 1990, ES&G invited the city "and others" to a meeting to discuss: (1) insurance coverage at the site, (2) formation of a joint defense group, and (3) formulating a response to DNR's demands.

On February 8, 1991, DNR's Bureau of Legal Services notified ES&G that "unless a PRP group signs a contract with WDNR for this site by May 31, 1991, WDNR will request that this site be listed on the NPL." The bureau warned that if that occurred, EPA would attempt to negotiate Administrative Consent Orders with the PRPs. If unsuccessful, EPA could issue an order requiring the PRPs to undertake clean up and remediation, or undertake the action itself and sue the PRPs to recover its costs, or EPA could seek forfeitures and treble damages from the PRPs for noncompliance.[13]

DNR's letter informed ES&G that its experience had been "that work done under contract with WDNR goes much quicker, is less complex and less costly than work done on NPL sites." DNR emphasized that a contract with it was the "*only* mechanism acceptable to WDNR" to prevent listing the

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[13]The response actions which EPA may take under Superfund include: removal of hazardous substances and remediation, 42 U.S.C. § 9604(a); any other measure consistent with the national contingency plan EPA considers necessary to protect the public health or welfare of the environment, 42 U.S.C. § 9605; abatement, 42 U.S.C. § 9606(a); and recovery of costs and damages, 42 U.S.C. § 9607.

site on the NPL.[14] On September 12, 1991, ES&G, the city, and other PRPs entered into a contract with DNR pursuant to sec. 144.442, Stats., and CERCLA to investigate the site conditions and remediate the landfill.[15]

The PRPs' election to participate in the Superfund process was voluntary only in the sense that they could have elected not to contract with DNR. However, the acknowledged consequences of that election were NPL listing followed by EPA clean up and assessment of the costs to the PRPs, possible fines, and probable DNR action if the site could not be cleaned up quickly enough under the Superfund

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[14]For a description of the purpose and implementation of the National Priorities List, see 57 Fed. Reg. 47,190 (Oct. 14, 1992), to be codified at 40 C.F.R. Part 300. As of October 14, 1992, final and proposed NPL sites totalled 1,236, including forty in Wisconsin. *Id.* at 47,201. To date, EPA has completed approximately 33,000 Preliminary Assessments and approximately 16,000 Site Inspections. *Id.* at 47,183. Lathrop states that "[s]uggestions have been made that there may be as many as 450,000 potential NPL sites throughout the country." ENVIRONMENTAL CLAIMS INSURANCE § 1.03[2] at 1-14 n. 12.

[15]The contract was pending when the amended judgment was entered July 18, 1991. We take judicial notice of the executed contract and appended work plan which is found in the files of the Environmental Response and Repair Section of the Solid Waste and Hazardous Waste Management Division of DNR (Southern District Headquarters), Edgerton Sand & Gravel Landfill, Contract SF-91-02. *See* sec. 902.01(3), Stats.; George R. Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 38, 43-45 (1960).

Program.[16] DNR's letter of February 27, 1990, stated: "Quick resolution of the problems associated with the site is the Department's main objective" The PRPs' choice was Hobson's.

We adopt the following statement of the *Ryan* court:

> If government assumes an adversarial posture, making sufficiently clear that the force of the State will be brought promptly to bear in a way that threatens the insured with probable and imminent financial consequences, then the functional equivalent of a suit may be in progress and the insured might reasonably expect the insurer to defend.

Ryan, 916 F.2d at 741.

In this case, EPA and DNR assumed an adversarial posture toward ES&G and the city, making very clear that failure of ES&G and the city to contract with DNR to remediate and clean up the landfill would inevitably lead to devastating financial consequences for them.[17] ES&G and the city could reasonably expect that their insurers would

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[16]DNR may initiate environmental repair directly under sec. 114.442, Stats.

[17]"What is obvious is that no matter which enforcement vehicle an environmental regulatory agency elects to use to achieve remediation of a contaminated site, those adjudicated to have been responsible for the creation of the contamination will sooner or later be asked to pay." ENVIRONMENTAL CLAIMS INSURANCE § 3.03(2) at 3-17.

defend them against the government's coercive actions. The degree of compulsion wielded by EPA and DNR against ES&G and the city is an "apt proxy" for measuring ES&G's and the city's expectation of liability.[18] We mark the degree of compulsion which triggered the insurers' duty to defend as being reached upon receipt of DNR's certified letter of February 27, 1990.[19]

II.

SUPERFUND RESPONSE COSTS AS DAMAGES

The duty of an insurer to defend a "suit" is not triggered, however, unless the suit seeks "damages." "[A]bsent the possibility that money damages might be awarded, the insurer would have no duty to defend." *School Dist. of Shorewood v. Wausau Ins. Cos.*, 170 Wis. 2d 347, 366, 488 N.W.2d 82, 88 (1992). While the duty to defend is broader than the duty to indemnify, the insurer has no duty to defend an insured in a "suit" in which the insurer has no economic interest. *Id.* at 364, 488 N.W.2d at 87-88 (citing

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[18]General Casualty argues that the city may have been treated differently from other PRPs, citing the Interim Municipal Settlement Policy, 54 Fed. R. 51, 071-72 (1989). The record does not support General Casualty's claim. Throughout, the degree of compulsion wielded by EPA and DNR against the city has been the same as that wielded against the other PRPs.

[19]However, Aetna's duty to defend is not triggered until the policy limit of the underlying insurance is exhausted. On the record available to us, we cannot determine whether or when that occurred. That determination shall be made on remand.

7C JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4683 (1979 & Supp. 1992)). Thus, we must consider whether General Casualty and Aetna have an economic interest in the Superfund initiative. They argue that they do not have such an interest because their policies limit coverage to "sums which the insured shall become legally obligated to pay *as damages*. (Emphasis added.) General Casualty and Aetna contend that Superfund remediation and clean-up costs are not "damages" because those costs are incurred in response to claims for injunctive or restitutionary relief.

In *School Dist. of Shorewood*, the court said that a classification based on the form of the action, as either equitable or legal, is irrelevant. "Where the parties have contracted to limit recovery to a specific quantifiable type of remedy [e.g., damages], a court should not alter the insurance contract to include other types of remedies not contracted for...." *Id.* at 369, 488 N.W.2d at 89. The plaintiffs sought declaratory and injunctive relief to remedy inequality of educational opportunity by requiring the defendants to correct racially discriminatory practices. *School Dist. of Shorewood* simply stands for the proposition that "[t]he term 'damages' does not encompass the cost of complying with an injunctive decree." *Id.* at 368, 488 N.W.2d at 82. The court said: "An injunction looks to the future conduct of the parties and is preventive in nature. Damages, on the other hand, are remedial in nature, not preventive." *Id.* at 370, 488 N.W.2d at 90. The *School Dist. of Shorewood* court said that:

> "Damages" as used in these insurance policies unambiguously means legal damages. It is legal compensation for past wrongs or

> injuries and is generally pecuniary in nature. The term "damages" does not encompass the cost of complying with an injunctive decree.

Id. at 368, 488 N.W.2d at 89.

The court said that "in the insurance context, the term 'damages' has an accepted technical meaning in law."[20] *Id.* at 368 n.6, 488 N.W.2d at 89 n.6. Therefore, we may not rely on those cases from other jurisdictions which have concluded that the term "damages" in the standard-form CGL policy is ambiguous. However, we conclude that Superfund response costs fall readily within the compass of "legal damages."[21]

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[20]*See Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979 (4th Cir. 1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986); *A. Johnson & Co. v. Aetna Casualty & Sur. Co.*, 741 F. Supp. 298 (D. Mass. 1990), *aff'd*, 933 F.2d 66 (1st Cir. 1991); *Verlan, Ltd. v. John L. Armitage and Co.*, 695 F. Supp. 950 (N.D. Ill. 1988); *Travelers Ins. Co. v. Ross Elec. of Washington, Inc.*, 685 F. Supp. 742 (W.D. Wash. 1988); *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990). *See also* decisions collected in *Minnesota Mining & Mfg. v. Travelers Indem.*, 457 N.W.2d 175, 180 n. 5 (Minn. 1990).

[21]*School Dist. of Shorewood* does not require a contrary conclusion. The school districts cited to the court many CERCLA cases holding that Superfund clean-up costs constitute "damages" under the terms of insurance policies. The court noted the disagreement among courts as to whether clean-up costs under Superfund constitute "damages." The court said:

The Superfund initiative to which ES&G and the city are subject does not look solely to the future conduct of ES&G and the city; it looks to conduct which has already caused injury and will continue to cause injury unless the cause of the injury is eliminated. To the extent that the Superfund initiative will remediate an ongoing injury to the environment, it is preventive. However, the "damages" which ES&G and the city must pay are not confined to future injuries but include "legal recompense for injuries sustained." *School Dist. of Shorewood*, 170 Wis. 2d at 372, 488 N.W.2d at 91.

In this respect, the following statement of the court in *Upjohn Co. v. Aetna Casualty and Sur. Co.*, 768 F. Supp. 1186, 1199-1200 (W.D. Mich. 1990),[22] expresses a common sense approach, which we adopt:

> [O]nce property damage is found as a result of environmental contamination, clean-up costs

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> The issue of whether clean-up costs constitute "damages" under the terms of an insurance contract has never been addressed by a Wisconsin court. Such an important issue should not be decided in a cursory fashion by this court. Therefore, we decline to adopt or apply the analogy posited by the school districts.

170 Wis. 2d at 374, 488 N.W.2d at 91.

[22] *Upjohn* quoted from *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich. 1988), *vacated and dismissed*, 132 F.R.D. 660 (W.D. Mich 1990), *aff'd*, 955 F.2d 1085 (6th Cir. 1992) (Upon petition for realignment of the parties, the court concluded it no longer had jurisdiction based on diversity).

> should be recoverable as sums that the insured was liable to pay as the result of property damage. In this context the argument concerning the historical separation of damages and equity is not convincing ... the insured ought to be able to rely on the common sense expectation that property damage within the meaning of the policy includes a claim which results in causing him to pay sums of money because his acts or omissions affected adversely third parties. While such claims might be characterized as seeking "equitable relief," the clean-up costs are essentially compensatory damages for injury to common property and for that reason the insured has a duty to defend.... [T]he short answer is that from the standpoint of the insured damages are being sought for injury to property. It is that contractual understanding rather than some artificial and highly technical meaning of damages which ought to control.[23] [Citations omitted.]

The legal-equitable distinction to which the *Upjohn* court refers has been rejected by a majority of the courts which have considered whether site remediation and clean-up costs incurred in response to coercive government action are

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[23]In Part III we conclude that migration of VOCs from a landfill into the groundwater is an invasion of the right of private occupancy, a "personal injury" under General Casualty's and Aetna's policies. The statement of the *Upjohn* court as to property damage applies with like force to personal injury.

amounts paid by the insured as "damages" under a standard-form CGL insurance policy. *See* numerous decisions collected in *Minnesota Mining & Mfg. v. Travelers Indem. Co.*, 457 N.W.2d 175, 180-81, n.6 (Minn. 1990); *see also Village of Morrisville Water & Light Dept. v. United States Fidelity & Guar. Co.*, 775 F. Supp. 718, 726 n. 10 (D. Vt. 1991). In *Village of Morrisville*, the court concluded that the "clear majority of courts" have held that CERCLA clean-up costs are "damages" under CGL insurance policies.[24] 775 F. Supp. 718, 725-26. *See also Wagner v. Milwaukee Mut. Ins. Co.*, 145 Wis. 2d 609, 613 n.3, 427 N.W.2d 854, 856 n.3 (Ct. App. 1988), *overruled on other grounds, Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 759, 456 N.W.2d 570, 578 (1990).

In *Minnesota Mining & Mfg.*, the federal district court asked whether, under Minnesota law, the costs of complying with directives issued by state and federal environmental agencies to clean up groundwater contamination caused by pollution were covered under the insureds' CGL insurance

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[24]Lathrop states that '[s]ince 1990, most courts that have considered the question have held that the costs of cleaning up environmental damage, costs connected with CERCLA or state statutes, are covered by the CGL insuring agreement which pays 'all sums which the insured shall become legally obligated to pay as damages.'" Environmental Claims Insurance § 3.03[4] at 3-26 n.50 (citing numerous decisions). Lathrop lists the following states as rejecting the "as damages" defense or which would follow the trend of the majority: California, Colorado, Delaware, Idaho, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Carolina, Vermont, Washington, and Wyoming. The "as damages" defense continues to be viable in Maine, Maryland, New Hampshire and New York. *Id.*

policies. 457 N.W.2d 175, 176-77. The Minnesota Supreme Court concluded that such costs were covered.

The court noted that liability for groundwater contamination had been recognized in Minnesota for many years. *Id.* at 183. Thus, the insured and the insurers were aware of the potential liability for groundwater contamination at the time they entered into the insurance contracts in question. The court said that the advent of environmental protection statutes "[has] merely changed the form of the liability for ground water pollution, not the nature of that liability." *Id.*

Likewise, Wisconsin has recognized for many years that one who causes groundwater contamination may be liable therefor. *Anstee v. Monroe Light & Fuel Co.*, 171 Wis. 291, 177 N.W. 26 (1920) (utility plant liable for contamination of adjoining landowner's soil and well). When the parties to this action contracted for comprehensive general liability insurance, it was within their reasonable expectation that coverage would extend to damages caused by groundwater contamination.[25] We agree with the Minnesota court that environmental protection statutes have not changed the nature of such liability but only the form. We conclude that the

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[25]When General Casualty wrote its policies, several environmental laws were in place imposing potential liability on operators and users of sites at which toxic wastes had been disposed. The federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991, was enacted in 1976. CERCLA became effective December 11, 1980. the Wisconsin Hazardous Waste Management Act and its hazardous substance spills legislation were enacted by ch. 377, Laws of 1977. The environmental repair legislation was enacted by sec. 63, 1983 Wis. Act 410.

insurer may not escape liability for a risk it has insured simply because it is the government rather than a private party which demands that the person responsible repair environmental damage.

Indemnity for sums the insured becomes obligated to pay for causing injury to the groundwater is within the reasonable expectation of an insured operating or using a solid waste landfill. The ultimate test in construing an insurance contract is not what the insurer intended the words of the contract to mean, but what a reasonable person in the position of an insured would have understood the words to mean. *Herwig v. Enerson & Eggen*, 98 Wis. 2d 38, 40, 295 N.W.2d 201, 203 (Ct. App. 1980), *aff'd*, 101 Wis. 2d 170, 303 N.W. 2d 669 (1981) ("The test of coverage is what a reasonable person in the position of the insured would have believed to be covered...."). ES&G and the city could reasonably have understood that the term "damages" in the policies before us included injury to the groundwater caused by their operation and use of the landfill.

We adopt the reasoning of those courts which have held that costs incurred to prevent future pollution damage of a kind which has already occurred constitute "damages" within the meaning of the standard-form CGL policy. In *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1190 (N.D. Cal. 1988), *aff'd in part; rev'd in part on other grounds*, 952 F.2d 1551 (9th Cir. 1991), the court pointed out that when the parties negotiated the insurance contract, neither party anticipated claims for investigation and

clean-up costs under CERCLA.[26] However, what the parties did contemplate was that if Intel became legally obligated to pay damages to a third party because of property damage inflicted by Intel, the insurance carrier would indemnify Intel. The court concluded that as a PRP, Intel was legally obligated to pay all costs associated with cleanup of the subject property. The court therefore held that Superfund response costs constituted "damages" within the reasonable and normal expectations of the parties. *Id.* at 1189-90. Other decisions reaching the same conclusion are collected in the Annotation, *Liability Insurance Coverage for Violations of Anti-Pollution Laws*, 87 A.L.R. 4th 444, § 5 at 483-85 (1991 & Supp. 1992).

We further conclude that faced with the consequences of inaction, ES&G and the city had a duty to the insurers to mitigate their damages by contracting with DNR to clean up and remediate the landfill. ES&G and the city could have refused to contract with DNR or otherwise respond to the Superfund initiative. Inevitably, the clean-up and remediation work would have been done by EPA or DNR or settling responsible parties, who would have sued ES&G and the city for their share of the costs.

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[26]The Sixth Circuit Court of Appeals suggests that CERCLA's PRP approach may represent "a unique legal creation, with no true parallel in any other area of administrative law." *Ray Indus. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 764 (6th Cir. 1992). We agree with the *Ray* court that that fact does not justify deviating from the plain language of an insurance contract. But that fact also does not justify construing an insurance contract strictly to frustrate the normal expectations of the insured.

DNR stated that its experience had been that if the necessary work is done by EPA, the cost will be significantly higher than if the work is done under a DNR contract. Insureds have a duty to mitigate damages for the insurers' benefit, either under cooperation clauses such as those contained in the insurers' policies, or under common-law doctrine.[27] 18 Couch on Insurance § 74:645 (2d ed. 1983 & Supp. 1992) ("[I]t is the duty of the insured to do all that he reasonably can to minimize the loss, and a failure to take reasonable care to avoid an increase of the loss may defeat a recovery."). *See Howard v. State Farm Mut. Auto. Liab. Ins. Co.*, 70 Wis. 2d 985, 993, 236 N.W.2d 643, 647 (1975) ("[T]he general rule does require the damaged party to use reasonable efforts to mitigate the damages."). *See also Metalmasters of Minneapolis, Inc. v. Liberty Mut. Ins. Co.*, 461 N.W. 2d 496, 501 (Minn. App. 1990) ("Mitigation is a duty the insured performs for the insurer's benefit. Mitigation cost is recoverable so long as it is reasonable and less than the damages would have been without it.").

For the foregoing reasons, we conclude that the term "damages," as used in the policies before us, includes the costs incurred by ES&G and the city in responding to the Superfund initiative.

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[27]General Casualty and Aetna allege as affirmative defenses to this action that ES&G and the city may have failed to mitigate their damages.

III.

PERSONAL INJURY LIABILITY COVERAGE

The insurers' policies promise to pay on behalf of the insureds all sums which they become legally obligated to pay as damages because of "personal injury."[28] "Personal injury" is defined to include "wrongful entry or eviction or other invasion of the right of private occupancy." General Casualty and Aetna argue that each of these torts "requires an unprivileged taking of real property from a person claiming a possessory interest." We disagree.

In *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 676, 476 N.W.2d 593, 608 (Ct. App. 1991) (citing Comment, *Liability of Landowner for Pollution of Percolating Waters*, 39 MARQ. L. REV. 119, 130 (1955)), we held that "[c]hemicals seeping or percolating through groundwater can constitute an invasion" of another's interest in the private use and enjoyment of land. We concluded that under section 822(b) of the RESTATEMENT (SECOND) OF TORTS, "a negligent invasion may be the basis of liability under a private nuisance theory." *Id.* We also held that the intrusion of VOCs into well water may constitute an actionable negligent trespass. *Id.* at 677, 476 N.W.2d at 608 (citing RESTATEMENT (SECOND) OF TORTS § 165 (1965)). None of these "offenses" require dispossession of the land owner.

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[28]General Casualty provides coverage to ES&G for personal injury liability through a Coverage P addition to the CGL policy and to the city through a Broad Form Extended Liability Coverage Endorsement.

There is little decisional authority as to whether pollution of another's property "invades" the landowner's right of private occupancy, within the meaning of that term as used in general liability insurance policies. In *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 273 (1st Cir. 1990), the court held that allegations that noxious odors, noise and light emanating from the city's sewage plant unreasonably interfered with the plaintiffs' use of their homestead stated a claim for coverage for liability arising from an "other invasion of the right of private occupancy." In *Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co. and International Ins. Co.*, No. 91-3285, 1992 U.S. App. Lexis 23790 (7th Cir. 1992) (GENFED library, Current file), the court held that negligent conduct which polluted another's property and led to a seal order and imposition of an environmental reclamation lien arguably constituted an "other invasion of the right to private occupancy." In *Pipefitters* the court rejected the insurers' claim that there could be no coverage unless the insured intended to dispossess the landowner of his or her right of occupancy.

In each of these cases, the right invaded was clearly the right of *private* occupancy. The insurers argue that groundwater is public property and therefore contamination of the groundwater cannot constitute invasion of the right of *private* occupancy. We recognize that sec. 144.01(19), Stats., defines "waters of the state" to include groundwater. The state has not, however, denied landowners their historic rights of access to and use of the groundwater for agricultural and domestic uses. At one time in the history of our country, the right of a landowner to use underground water for private purposes was so jealously protected that pollution of a neighbor's groundwater by the landowner's use of

percolating waters beneath the surface of the landowner's land was regarded as *damnum absque injuria*, that is, a loss without an injury. Comment, 39 MARQ. L. REV. at 120-24.

The right of a landowner to obtain groundwater for agricultural and domestic uses is recognized and protected in Wisconsin by statute. Landowners may obtain a supply of groundwater by boring or drilling a private well. *See, e.g.*, sec. 144.027(1)(c)-(h), Stats. The legislature has provided compensation, subject to an income limitation, to the owner of a contaminated private well to treat or replace the water source. Section 144.027(7), Stats.

We conclude that access to, and use of, an undefiled underground water supply is a right of private occupancy. The invasion of that right is a personal injury, liability for which is covered by General Casualty's and Aetna's policies.

IV.

DAMAGE "NEITHER EXPECTED NOR INTENDED"

General Casualty argues that its policies do not provide coverage to ES&G and the city because they "expected" or "intended" to discharge contaminants from the landfill into the groundwater. General Casualty identifies two policy provisions which, it argues, exclude coverage where the insured expects or intends the act which causes damage: the "occurrence" definition and the pollution exclusion clause. However, by their terms, these provisions apply to bodily injury and property damage liability coverage

and not to personal injury liability coverage.[29] General Casualty argues, however, that the pollution exclusion clause and "other terms" of its basic policy "carry over" and apply to personal injury liability coverage under Coverage P and the Extended Liability Coverage Endorsement. General Casualty points out that while Coverage P is not part of ES&G's basic policy, it is attached to the policy "to complete said policy." Also, the endorsement to the city's policy "forms a part of the policy" and "modifies such insurance."

General Casualty's "carry over" argument would be more persuasive if Coverage P and the endorsement did not contain their own definitions and exclusions. Personal injury liability coverage is not triggered by an occurrence, but by an "offense [which] is committed during the policy period." Coverage P and the endorsement do not include a pollution exclusion. Moreover, application of an "expected or intended" exclusion to personal injury liability coverage would have the nonsensical result of making coverage illusory. Plainly, personal injury liability coverage is extended in Coverage P and the endorsement to intentional acts: false arrest, malicious prosecution, defamation, wrongful entry or eviction or other invasion of private occupancy rights. It would be an unreasonable construction of the policies to conclude that a coverage clause is wholly nullified by an exclusion clause. Insurance contracts should be given a reasonable interpretation and not one which leads to an absurd result. *Olguin v. Allstate Ins. Co.*, 71 Wis. 2d 160, 165, 237 N.W.2d 694, 697 (1976).

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[29]"Bodily injury" as used in the policies refers to a physical injury. "Personal injury" includes torts against personal rights, which may or may not include physical injury.

We conclude, therefore, that because coverage for liability for groundwater contamination is extended to ES&G in Coverage P and to the city in the Extended Liability Coverage Endorsement through personal injury liability coverage, we need not consider whether coverage for that liability under the property damage clause would be excluded if ES&G and the city expected or intended to discharge contaminants into the groundwater.

V.

TRIGGER OF COVERAGE

We decline to decide whether the trial court correctly concluded that "[t]here is a continuous trigger of coverage for the policies of insurance issued by Aetna and General Casualty." First, the parties have not briefed the question whether the continuous trigger of coverage theory applies where the claim is for liability for personal injury. Second, the evidence at trial may obviate the need to decide this difficult question of law.

General Casualty disagrees with the continuous trigger approach adopted by the trial court, but claims that the record is insufficient to permit any intelligent discussion of the issue. Aetna argues that coverage under its policy is triggered only by an "injury-in-fact." The injury-in-fact theory holds that the policy in force at the time the claimant suffers actual injury is the policy which must respond. ENVIRONMENTAL CLAIMS INSURANCE § 6.04[4] at 6-16. Aetna argues there was no actual injury in this case until VOCs reached the groundwater. It contends that there is a

genuine issue of fact as to whether that occurred during its policy period.

ES&G and the city support the trial court's conclusion by citing *Wisconsin Elec. Power Co. v. California Union Ins.*, 142 Wis. 2d 673, 419 N.W.2d 255 (Ct. App. 1987) (*WEPCO*). In *WEPCO* we held that there was a continuous period of exposure from the time a defective power supply was installed at a dairy farm until the emission of stray voltage was corrected. We said that a reasonable interpretation of the definition of "occurrence" was that "as long as there is harmful exposure to dangerous conditions, the occurrence is continuing." *Id.* at 681, 419 N.W.2d at 258. ES&G and the city contend that VOC contamination of the groundwater was a continuous process which began when the first solvents containing VOCs were disposed of in the landfill and continued as more and more solvents were disposed of and migrated through the sand, soil and rock. Because Aetna's policy was in effect during this continuous process, they argue that coverage was triggered as a matter of law.

WEPCO was a property damage case. "The 'trigger of coverage' issue may be resolved differently depending upon the type of injury or damage that was suffered by the underlying claimant." ENVIRONMENTAL CLAIMS INSURANCE § 6.01 at 6-4. It was easy to conclude in *WEPCO* that the emission of stray voltage was a "single injurious process." *WEPCO* at 681, 419 N.W.2d at 258. The stray voltage was emitted from the power supply from the time the supply was installed until the problem was corrected. The continuous trigger theory does not lend itself as readily to potential

personal injury liability resulting from toxic torts and environmental claims.

Here, for example, it is necessary to ask whether an "invasion of the right of private occupancy" occurred when the groundwater was contaminated by percolating pollutants, or when waste containing VOCs was first disposed of in the landfill. The parties have not cited us any case applying the continuous trigger of coverage theory to a personal injury liability case. So far as our research discloses, the questions which must be answered in this case have not been answered by the courts. We decline to determine the appropriate trigger of coverage in this case without sufficient briefing by the parties. We believe that that briefing may be possible after all the relevant evidence is admitted at trial.

Further, the evidence at trial may obviate the need to answer this difficult legal question. The factfinder may determine after hearing the evidence that contamination of the groundwater indisputably occurred during Aetna's policy period.

VI.

OWNED-PROPERTY EXCLUSION

General Casualty's policies do not apply to property damage to property owned or used by the insured. Aetna's policy contains a similar exclusion. The insurers argue that their policies do not provide coverage for the costs involved in cleaning up and remediating the landfill itself. We disagree.

The owned-property exclusion is "more of a clarification of general liability than an exclusion." ENVIRONMENTAL CLAIMS INSURANCE § 3.08[1] at 3-107. We adopt the reasoning of those courts which have held that the owned-property exclusion does not apply where the concern is not primarily the premises of the insured, but rather the substantial harm, or risk of substantial harm, to third-party property, including natural resources belonging to the people of the state. *See* cases collected in the Annotation, *Liability Insurance Coverage For Violations of Antipollution Laws*, 87 A.L.R. 4th 444, §§ 27, 28[a] at 536-45 (1991 & Supp. 1992). *Intel* (discussed *supra*, Part II), is representative of those cases.

Intel entered into a consent decree with EPA to remediate the site at which it had stored toxic chemical solvents in an unsecured underground storage tank. Test results showed that the site was contaminated by hazardous waste solvents, both in the soil and in groundwater percolating beneath the soil.

Intel submitted to its insurer, Hartford Accident and Indem. Co., its claim for reimbursement for reasonable and necessary investigation and clean-up costs incurred by it in complying with the consent decree. Hartford denied coverage under its policy's owned, occupied or rented exclusion. The court concluded that the exclusion did not apply to Intel's response costs. The court emphasized that Intel's remediation efforts pursuant to the EPA-approved work plan were not taken "merely to restore [its] property." *Intel*, 692 F. Supp. at 1184.

As a PRP, Intel faced joint and several liability for the consequences of its contamination. The court noted that under the California Water Code all water within the state is the property of the people of the state. *Id.* at 1183. The court considered the EPA's assessment of the danger presented by Intel's disposal site was tantamount to a finding of public nuisance. The court concluded that costs incurred by Intel to abate this public danger were not excluded by Hartford's owned, occupied or rented exclusion.

In *Fortier*, we concluded that contamination of the groundwater may constitute a private nuisance. It may also constitute a public nuisance under Wisconsin law. The "waters of the state" include groundwater within the state. Section 144.01(19), Stats. It is undisputed that the federal and state governments may exercise their police powers to abate a public nuisance. This is not a case where the insured is incurring costs primarily to repair its own property. The cleanup and remediation is intended to repair the environment. We conclude that repairs to the site itself, when made as an element of a comprehensive clean-up and remediation plan designed to repair the environment, are not excluded from coverage by an owned-property exclusion clause. *See also Township of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394, 400 (D.N.J. 1987).

VII.

UNTIMELY NOTICE

We conclude that a genuine issue of material fact exists as to whether General Casualty and Aetna were

prejudiced by the insureds' untimely notices that the groundwater beneath and in the vicinity of the landfill was contaminated by VOCs possibly leaching from the landfill. The existence of that issue precludes the grant of summary judgment to any party. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473, 477 (1980). We note at the outset that there is persuasive authority that the preferred arbiter to resolve the issue of prejudice resulting from untimely notice to an insurer is the trier of fact. In *Ehlers v. Colonial Penn Ins. Co.*, 81 Wis. 2d 64, 67-68, 259 N.W.2d 718, 721 (1977), the court said that when controverted, the question of whether an insurer was prejudiced by failure to give timely notice is a question of fact for the trier of fact. Lathrop states: "To the extent that a trend can be detected, it would seem that it is shifting toward treating late notice issues as issues of fact to be resolved by the trier of fact rather than pure issues of law." ENVIRONMENTAL CLAIMS INSURANCE § 8.02[1][b] at 8-15.

Clearly, summary judgment methodology does not effortlessly embrace the prejudice issue. It is difficult for a party to an untimely-notice dispute to demonstrate a right to judgment with such clarity as to leave no room for controversy. *Grams*, 97 Wis. 2d at 338, 294 N.W.2d at 477. General Casualty and Aetna rely principally on the failure of the insureds to give them notice of the groundwater contamination for five to six years. They argue that this failure entitles them to summary judgment as a matter of law. Although they cite decisions in which the Wisconsin Supreme Court has held that lengthy delays entitled the insurers to summary judgment, we conclude that the effect of failure to give timely notices is now governed by statute.

Section 632.26(2), Stats., which applies to liability policies provides: "Failure to give notice as required by the policy ... does not bar liability under the policy if the insurer was not prejudiced by the failure, but the risk of nonpersuasion is upon the person claiming there was no prejudice." ES&G and the city argue that sec. 632.26(2) eliminates the rebuttable presumption that prejudice results from untimely notice, identified in *Gerrard Realty Corp. v. American States Ins. Co.*, 89 Wis. 2d 130, 140, 277 N.W.2d 863, 869 (1979). General Casualty asserts that the insureds' contention is in direct contradiction to sec. 631.81(1), Stats., which was construed in *Gerrard*. Section 631.81(1) provides that if the insured gives notice of loss as soon as reasonably practicable and within one year after the time it was required to be given under the policy, the claim is not invalidated unless the insurer shows prejudice. The *Gerrard* court said that where the claimant gave notice more than one year late, the burden of showing prejudice shifted to the claimant.

Section 631.81(1), Stats, like sec. 632.26(2), Stats., is "concerned with determining who wins when the totality of evidence is inconclusive ...." Legislative Council Note, 1979, sec. 632.26(2), Stats., Sections 631.81(1) and 632.26(2) are not concerned with tipping the scales as to prejudice in favor of either insurer or insured.

Further, a burden-shifting statute is of little utility on summary judgment where the movant already has the burden of going forward and bears a considerable burden of persuasion. We conclude therefore that whether summary judgment may be granted on the issue of prejudice because of the insured's untimely notice is to be determined by well-settled summary judgment methodology. If we identify

genuine issues of material fact, we must deny summary judgment, leaving for trial the application of any presumption and the risk of nonpersuasion.

We therefore examine the evidence to determine whether there is any genuine issue of fact as to whether General Casualty and Aetna were prejudiced by the insureds' untimely notice. General Casualty and Aetna argue that they were prejudiced by the loss of a valuable witness when the former owner of the landfill, Charles E. Sweeney, died in September 1989. General Casualty claims it has been prejudiced by failure of ES&G and the city to file timely claims with the liquidator of Iowa National because it lost the right of contribution from Iowa National. Finally, General Casualty contends that if it had known in 1984 of the groundwater contamination, it would not have continued to issue policies to ES&G and the city covering the landfill. Aetna argues that since 1984, ES&G may have allowed the contamination to intensify and spread, thus increasing the clean-up and remediation cost. Aetna also argues that, because of the excessive delay in notice, the insurers have been deprived of the opportunity to investigate the circumstances surrounding the insureds' claims.

The trial court found that there was nothing in the record to indicate that the insurers would have done anything different in 1984 than they did in 1989; that is, deny coverage and refuse to defend. The court also found that it was undisputed that records concerning the landfill and many of the witnesses to its operation were available for inspection and investigation; and studies as to the impact of the landfill on VOC groundwater contamination and necessary remedial measures were available.

We note that the waste types landfilled have been identified and the quantity estimated. *See* FOTH AND VAN DYKE, WORK PLAN FOR LANDFILL CLOSURE AND GROUNDWATER REMEDIAL INVESTIGATION/FEASIBILITY STUDY 6-7 (July 11, 1991).[30] Collection of a consistent set of indicator parameters from the groundwater began in May 1977 and included pH, temperature, conductivity, chemical oxygen demand, total hardness, chloride, iron, and sulfate. *Id.* at 7. Testing for VOC concentration began in February 1984. *Id.* The results of groundwater testing are reported in the February 1989 report by Warzyn Engineering, Inc. *Id.*

The landfill has been subject to DNR's licensing and regulatory authority since 1971. In a meeting between ES&G and DNR on February 15, 1984, the industries and major haulers who disposed of waste at the landfill were identified. ES&G has retained Warzyn Engineering since 1976 to advise it as to the design and operation of the landfill and to monitor groundwater quality. EPA made a Superfund inspection of the site in June 1984. In view of the considerable information available, the trier of fact could infer that General Casualty and Aetna have not been prejudiced by the passage of time since VOCs were first detected in the groundwater, or by the death in 1989 of the former owner and operator of the landfill, Charles E. Sweeney.

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[30]We recognize that the Work Plan was not completed when the circuit court rendered its decision. We cite the Work Plan solely to show that information as to the landfill and the groundwater is available to permit the insurers to participate intelligently in the investigation and remediation process.

The prejudice resulting from the insureds' failure to file a timely claim in the Iowa National liquidation is, at this time, problematic. Apparently, the liquidation is not completed. General Casualty suffered no prejudice from its issuance of policies after 1984 because ES&G and the city do not claim coverage under such policies.

While each party's proof is sufficient to make a *prima facie* case for summary judgment, the countervailing evidence establishes that there exist disputed material facts which entitle the opposing parties to a trial of the prejudice issue.

VII.

"DROP DOWN" AND "KNOWN LOSS" ISSUES

A. *"Drop Down" Issue.*

ES&G and the city do not argue that Aetna's policy "drops down" to provide primary coverage because of Iowa National's insolvency. They argue, however, that they have paid sums exceeding Iowa National's underlying policy or retained limit and therefore Aetna's duty to defend has been triggered. We conclude that on the record before us, we cannot determine whether, or when, ES&G and the city have become obligated to pay sums exceeding Iowa National's underlying policy limit. That issue shall be decided on remand.

B. *"Known Loss" Issue.*

It is fundamental that an insurer does not insure a loss which has already occurred. *Estate of Logan v. Northwestern Nat. Casualty Co.*, 144 Wis. 2d 318, 348, 424 N.W.2d 179, 190 (1988). General Casualty argues that there is a genuine issue of material fact whether ES&G and the city knew or should have known which they applied to it for liability coverage of the landfill that the groundwater was already contaminated by VOCs. We need not consider this issue because we have already concluded that there is a genuine issue of fact that precluded summary judgment in favor of ES&G and the city. *See State v. Better Brite Plating, Inc.*, 160 Wis. 2d 809, 813, 466 N.W.2d 239, 243 (Ct. App. 1991), *modified*, 168 Wis. 2d 363, 483 N.W.2d 574 (1992) (summary judgment not appropriate to define and limit issues for trial).

IX.

CONCLUSION

This case comes before us on respective motion and cross-motions for summary judgment. We affirm the trial court's denial of the insurer's cross-motions for summary judgment and reverse its grant of summary judgment to ES&G and the city. In so holding, we find that the Superfund initiative constitutes the functional equivalent of a "suit" and expenditures for clean-up and remediation costs constitute "damages" under the terms of the insurers' policies; personal injury liability coverage provisions include injury to the groundwater, which is not excluded by the

"expected" or "intended" provisions of the policies; and the owned-property exclusions do not preclude coverage for remediation of the insured's property where the purpose of such work is to stop or prevent environmental damage. We also find that a trial is necessary to decide factual issues as to the appropriate trigger of coverage; the "known loss" and "drop down" claims; and prejudice resulting from untimely notice to the insurers.

By the Court.--Judgment affirmed in part, reversed in part and cause remanded.

Recommended for publication in the official reports.

STATE OF WISCONSIN
CIRCUIT COURT ROCK COUNTY

CITY OF EDGERTON and
EDGERTON SAND & GRAVEL, INC.,

Case No. 90-CV-939

Plaintiffs,

vs. DECISION

GENERAL CASUALTY COMPANY OF WISCONSIN, WISCONSIN INSURANCE SECURITY FUND, AETNA CASUALTY AND SURETY COMPANY, HANOVER INSURANCE COMPANIES and LOCAL GOVERNMENT PROPERTY INSURANCE FUND,

Defendants.

Plaintiffs Edgerton Sand & Gravel and the City of Edgerton have moved this court pursuant to Section 806.04, Stats. for a declaratory judgment that the policies of the defendant insurers cover cleanup costs of the operation or use of the landfill located at Edgerton, Wisconsin. Defendants General Casualty Company and Aetna Casualty and Surety Company were insurers of Edgerton Sand & Gravel and City of Edgerton at various times during the operation of the landfill. The insurance companies have denied coverage and refused to defend Edgerton Sand & Gravel and the City of Edgerton. The defendant insurance companies have cross-

moved for summary judgment on certain issues, including dismissal of plaintiffs' action.

Whether the complaint for declaratory judgment states a justiciable controversy ripe for judicial determination between the parties depends upon the Court's rulings with respect to several issues. A hearing was held on May 8, 1991 at which time the Court heard the arguments of counsel. Prior to the hearing, lengthy briefs were received from the parties and reviewed by the Court. Because of the urgency for a decision, I indicated I would rule on the issues without extensive elaboration. In any event, the issues involve questions of law which an appellate court would review without deference to the trial court.

1. **Were defendants' liability and excess policies triggered while volatile organic compounds were migrating into the ground water and when these compounds were discovered in the ground water?** I conclude that coverage was triggered. The use of the landfill as a disposal site for materials containing VOCs, the actual movement of the VOCs to the ground water and surrounding properties, and the discovery of the VOCs in the ground water, are all events which trigger policy coverage of the defendant insurers.

2. **Do personal injury coverage provisions apply to the migration of the VOCs constituting an invasion of the right of private occupancy by contaminating the ground water?** Ground water is considered the part of the "waters of the state." Section 144.01(19), Stats. The surrounding properties have the right to use the ground water. The migration of the VOCs into the ground water was an invasion of the private occupancy of the

surrounding properties which have rights to use of that water. I find the personal injury provisions provide coverage for damages sustained because of the migration of the VOCs into the ground water.

3. **Are the costs of remediation and cleanup sums of money the insurers are required to pay as damages because of property damage and personal injury?** I conclude that remediation and cleanup are damages covered under subject policies. The contamination of surrounding ground water constitutes a loss of use and tangible injury to property within the terms of the policies. This contamination constitutes an invasion of the interest of the surrounding land owners and private occupancy. 144.09(19). Under the subject policies, this constitutes both a personal injury and property damage.

4. **Do the defendant insurance companies have a duty to defend the plaintiffs from the demands of the WDNR and the EPA?** Of all the issues, this is the most difficult to resolve. Defendants claim no duty to defend because there has not been any "suit" filed against the insureds. While the policies do not define the term "suit," it has a well-understood ordinary meaning which is clear and unambiguous. "Suit" in this context is commonly defined "an action or process in a court for the recovery of a right or claim." *Webster's New Collegiate Dictionary*, 9th Ed., 1180 2b (1987). *Black's Law Dictionary* defines suit "any proceeding by one person or persons against another or others in a court of justice." *Black's Dictionary* 1286 (5th Ed. 1979). Thus defendants argue "suit" refers to court proceedings. It is undisputed there have been no court proceedings against either Edgerton Sand & Gravel or the

City of Edgerton in this case. Defendants cite numerous authorities in support of this position that because no suit has been filed this action should be dismissed.

However, as plaintiffs point out, the language of the subject policy should further the reasonable expectations of the insured and any ambiguity should be resolved in favor of coverage. It is clear from the correspondence from the Environmental Protection Agency and the Wisconsin Department of Natural Resources that demand has been made upon Edgerton Sand & Gravel and the City of Edgerton to take remedial action to cleanup the contamination. Plaintiffs cite a number of recent cases in support of this position, which the defense argues are strained at best. Nevertheless, because of the peculiar and unique nature of these proceedings, a broader, more liberal interpretation may be required. The letter of February 8, 1991 from Patricia M. Hanz of the Wisconsin Department of Natural Resources to Attorney John C. Martin makes the point very clear. If the potentially responsible parties do not enter into a voluntary agreement by May 31, 1991 for remediation and cleanup of the site, Edgerton Sand & Gravel and the City of Edgerton could face serious consequences. Accordingly, the nature of the claims being made require a defense now rather than waiting for the filing of civil suits in the future. I find the insurers have a duty to defend and that that duty arises herein before the filing of actual civil litigation.

5. **Does the pollution exclusion contained in the policies exclude coverage or was the discharge, disbursal or escape of the VOCs sudden and accidental?** This court finds that the contamination was not expected and intended and, therefore, there is coverage pursuant to the

comprehensive general liability policy issued by the defendants.

The above determinations are based upon the facts contained in the affidavits, interpretation of the General Casualty and Aetna insurance policies, the legal authorities cited, and the arguments of counsel.

Plaintiffs' motion for summary judgment is granted.

Defendants' cross-motions for summary judgment on various issues and dismissal are denied. Defendants have claimed lack of proper notice of plaintiffs' claims, arguing that notice should have been given to defendants of potential claims back in 1983 and 1984. Defendants were given notice of the claim in 1989 and denied coverage, and it's reasonable to conclude defendants would have taken the same action in 1984.

Section 632.26(2) of the Statutes provides: Effect of Failure to Give Notice. Failure to give notice as required by the policy, as modified by (1)(b), does not bar liability under the policy if the insurer was not prejudiced by the failure, but the risk of nonpersuasion is upon the person claiming there was no prejudice. Based upon the records and evidence herein, I find no indication of any prejudice to General Casualty's investigation or its ability to investigate facts.

The issues decided herein could be decided in another way by another court and, accordingly, I find no evidence that the insurance companies acted in bad faith, and will grant to the defendants summary judgment on that issue.

Counsel for the plaintiffs is directed to prepare appropriate findings and an order for the Court's signature. Dated this 10th day of May, 1991.

BY THE COURT:

/s John H. Lussow
Circuit Court Judge

Supreme Court, U.S.
FILED
JUN 8 1995
OFFICE OF THE CLERK

(2)

No. 94-1843

In The

Supreme Court of the United States

October Term, 1994

EDGERTON SAND & GRAVEL, INC.,

Plaintiff-Respondent-Petitioner,

vs.

GENERAL CASUALTY COMPANY OF WISCONSIN and AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellants-Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court has jurisdiction to grant a petition for writ of certiorari when the state supreme court decision is based on independent and adequate state grounds.

2. Whether a Wisconsin Supreme Court Justice should be disqualified from participating in a case even though there is no conflict under Wisconsin Statute § 757.19(2) and the party raising the conflict waived any objection it may have had to the justice's participation under Wisconsin Statute § 757.19(3).

STATEMENT PURSUANT TO RULE 29.1

Respondent, General Casualty Company of Wisconsin, is a corporation organized under the laws of the State of Wisconsin and is owned by Winterthur U.S. Holdings. Winterthur U.S. Holdings is a Delaware corporation wholly owned by Winterthur Swiss Insurance Company, a Swiss Company.

Respondent, Aetna Casualty & Surety Company, is a wholly owned subsidiary of Aetna Life & Casualty Company.

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No. 94-1843

In The

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October Term, 1994

EDGERTON SAND & GRAVEL, INC.

Plaintiff-Respondent-Petitioner,

vs.

GENERAL CASUALTY COMPANY OF WISCONSIN and AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellants-Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, General Casualty Company of Wisconsin ("General Casualty") and Aetna Casualty & Surety Company ("Aetna"), respectfully request this Court deny the petition for writ of certiorari seeking review of the Wisconsin Supreme Court's decision denying Edgerton Sand & Gravel, Inc.'s ("ES&G") Motion To Vacate Decision Or Alternatively To Rehear The Case Without The Participation Of Challenged Justice.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1257(a), this Court is without jurisdiction to entertain this petition because the Wisconsin Supreme Court decision is based on independent and adequate state grounds and there is no federal issue to be decided.

STATUTORY PROVISIONS INVOLVED

Wisconsin Statute § 757.19 provides, in part:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> > (a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.
> >
> > * * *
> >
> > (f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.
> >
> > * * *
>
> (3) Any disqualification that may occur under sub. (2) may be waived by agreement of all parties and the judge after full and

complete disclosure on the record of the factors creating such disqualification.

STATEMENT OF THE CASE

The decision which ES&G seeks to vacate involves an issue concerning insurance coverage for environmental claims. The parties — ES&G, the City of Edgerton (the "City"), General Casualty and Aetna — sought the state court's interpretation of a variety of insurance policy provisions including the policy terms "suit" and "damages." In 1992, the Wisconsin Court of Appeals ruled in favor of ES&G and the City on these issues and on June 16, 1994 the Wisconsin Supreme Court reversed, granting summary judgment in favor of the insurers. Both ES&G and the City petitioned this Court for writ of certiorari on the issue of "damages."[1] The petition was denied on March 20, 1995.

For all practical purposes, the case is now over. ES&G and the City have exhausted all legitimate avenues to contest the Wisconsin Supreme Court decision.

In a last ditch effort to contest the decision, ES&G, by its sole shareholder, Attorney Charles V. Sweeney, moved the Wisconsin Supreme Court to vacate its decision and disqualify a member of the court. In its motion, ES&G claimed one of the four justices in the majority had a conflict of interest rendering the June 16, 1994 decision void. There was no conflict of interest. ES&G's motion was nothing more than an unwarranted attack on a Wisconsin Supreme Court Justice in an improper attempt to obtain a different result. This unwarranted attack continues.

A chronology of the events exposes the true motives behind

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1. ES&G's claim that it petitioned this Court for writ of certiorari on the issue of "suit" as well is simply wrong. (Pet. at 8).

ES&G's motion. At the commencement of oral argument on November 29, 1993, Justice Geske stated:

> I also want to make a disclosure. Last night, when I was looking one more time at the amicus briefs, I noted that Mr. Burrell had filed an amicus brief on behalf of the Insurance Environmental Litigation Association, and I looked at the appendix and I noted that one of the companies listed in that is St. Paul Companies. My husband is employed by that company. I do not believe that presents any conflict and will not influence me. If anybody has any objections to me sitting on this case, I would appreciate hearing from you in letter by the end of the week. Thank you.

(Pet. App. 105-06).

No one objected to Justice Geske's participation in the decision. For months, the Wisconsin Supreme Court carefully analyzed the facts and law. Throughout the entire process, no one raised any question concerning Justice Geske's impartiality. After the Wisconsin Supreme Court rendered its June 16, 1994 decision, the plaintiffs, together with 100 plus proposed *amici curiae*, filed motion after motion in a choreographed attempt to convince the Wisconsin Supreme Court its decision should be withdrawn. There was a motion for reconsideration, a motion to supplement the record, motions for leave to file *amicus curiae* briefs, and a motion for leave to file a reply brief. None of the motions questioned Justice Geske's ability to impartially hear the case. Twelve proposed *amici curiae briefs* were filed. None of the proposed briefs questioned Justice Geske's fairness or impartiality.

On September 2, 1994, three proposed *amici curiae* filed an *amici* motion to vacate the court's decision or alternatively to request Justice Geske disqualify herself (hereinafter referred to as the "K.A.T. Realty motion").[2] Neither ES&G, the City nor the other 100 plus entities filing *amici curiae* motions joined in this motion.

Had there been any real concern about Justice Geske's impartiality, both ES&G and the City would have objected to her participation before the case was decided. They did not. Nor did they join in the almost identical K.A.T. Realty motion. Instead, they waited for the Wisconsin Supreme Court's decision on their motion for reconsideration.

On October 25, 1994, the Wisconsin Supreme Court denied ES&G and the City's motion for reconsideration. One month later (and over a year after the disclosure at oral argument, five months after the June 16 decision was rendered, and almost three months after the K.A.T. Realty motion was filed) ES&G — alone — filed a motion to vacate the court's decision claiming Justice Geske was disqualified from hearing the case under Wisconsin Statute § 757.19 and due process grounds. Neither the City, counsel representing both the City and ES&G throughout the entire litigation, nor Attorney Sweeney's own law firm supported the motion.

In an attempt to allege a conflict, the motion papers filed by ES&G in the Wisconsin Supreme Court were replete with what could, at best, be described as misstatements, and unsupported allegations and conclusions. In its February 23, 1995 decision on the motion, the Wisconsin Supreme Court repeatedly criticized ES&G for its "persistent and unfounded" assertions, many of which ES&G continues to make here. (Pet. App. at 109).

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2. The motion for leave to file an *amici* motion was denied by the Wisconsin Supreme Court on September 15, 1994.

A unanimous Wisconsin Supreme Court (without the participation of Justice Geske) denied ES&G's motion finding it meritless.[3] The decision was based solely on the Wisconsin disqualification statute. The court determined, pursuant to Wisconsin Statute § 757.19(2), there was no conflict of interest and Justice Geske had acted in an impartial and just manner. (Pet. App. at 112). The court also determined, pursuant to Wisconsin Statute § 757.19(3), ES&G had on multiple occasions, waived whatever objections it may have had to Justice Geske's participation in the court's decision. (Pet. App. at 102, 104-05, 106, 108). ES&G now petitions for writ of certiorari seeking a review of the Wisconsin Supreme Court's decision dismissing its motion to vacate the June 16, 1994 decision and disqualify Justice Geske.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to grant this petition. The Wisconsin Supreme Court's decision was based on independent and adequate state grounds and this case fails to present a substantial federal question. This Court has consistently observed the long standing rule that it cannot review a judgment of a state court that rests on independent and adequate state grounds.

Even if this Court had jurisdiction, this case involves the interpretation of Wisconsin's disqualification statute. Federal courts are bound by state courts' interpretation and application of their own state statutes. Review of a state supreme court's

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3. In addition, the Wisconsin Judicial Commission, the body charged with investigating Wisconsin ethics complaints, investigated an anonymous complaint lodged against Justice Geske alleging her participation in the case constituted a violation of the Wisconsin Code of Judicial Ethics. After a thorough investigation, the Commission determined there was no probable cause to believe any violation had occurred. (Pet. App. at 113-14).

decision interpreting its own state statute is far removed from the role of this Court.

In an attempt to create a federal issue, ES&G claims its due process rights have been violated. However, as this Court and others have held, where there is a disqualification statute, it is unnecessary to address the due process issue because the failure to demonstrate disqualification under the statute, *a fortiori*, defeats a due process challenge.

Finally, even if the jurisdictional defect could be ignored and ES&G could somehow transform this state issue into a federal one, the petition still does not merit review. The first issue presented by ES&G concerning the *amicus curiae* is totally irrelevant to any due process analysis and assumes — incorrectly — facts not present in this case. Contrary to ES&G's assertions, St. Paul was **not** an *amicus curiae* in the case and Justice Geske did **not** have a direct, personal, substantial and pecuniary interest.

Because there are no grounds for disqualification in the first instance, ES&G's second issue concerning the appropriate waiver standard is inapplicable. Moreover, this Court lacks jurisdiction to address the waiver issue because it was not raised in the Wisconsin Supreme Court. Finally, regardless of the standard employed, there is no doubt ES&G voluntarily, knowingly and intelligently waived any objection it may have had to Justice Geske's participation in the decision.

REASONS FOR DENYING THE WRIT

I.

THE WISCONSIN SUPREME COURT DECISION WAS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND THIS COURT LACKS JURISDICTION TO GRANT THE PETITION.

ES&G claims this Court has jurisdiction under 28 U.S.C. § 1257(a).[4] However, this Court has repeatedly held it lacks jurisdiction over a state case which fails to present a substantial federal question.

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. People of New York, 293 U.S. 52, 54 (1934), *reargument denied*, 266 N.Y. 431, 195 N.E. 141 (1934) (*see also*, cases cited therein).

When the judgment rests on state grounds, the Supreme Court has no jurisdiction to review the case. As the Court stated in

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4. Despite the requirements of Supreme Court Rule 14(h), ES&G fails to provide any explanation supporting its claim of proper jurisdiction.

Herb v. Pitcairn, 324 U.S. 117, 128 (1945), "[i]t is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law." *See also Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (when it is clear from the opinion the state court's decision was based on independent and adequate state grounds, the Court lacks jurisdiction); *Roundhouse Construction Corp. v. Telesco Masons Supplies Co.*, 429 U.S. 889 (1976) (writ denied because judgment below rested on adequate state grounds); *Fox Film Corp. v. Muller,* 296 U.S. 207, 209-10 (1935); Justice Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 501 (1977) (such "state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.").

In instances where both federal and state issues are presented to the state court and the state court chooses only to address the independent state issue, the Supreme Court lacks jurisdiction to review the case. *Fox Film Corp. v. Muller* is instructive.

In *Fox Film Corp.,* the litigants raised a state contract issue and a federal Sherman anti-trust issue. The Minnesota Supreme Court decided the state issue without deciding the federal issue. In finding that it lacked jurisdiction to hear the case, the Court stated:

> [T]he primary question to be determined by the court below was whether the concededly invalid clause was separable from the other provisions of the contract. The ruling of the state Supreme Court that it was not, is sufficient to conclude the case without regard to the determination, if, in fact, any was made, in respect of the federal question. It follows

> that the nonfederal ground is adequate to sustain the judgment.

Fox Film Corp., 296 U.S. at 210.

The same rationale applies here. In this case, the Wisconsin Supreme Court was presented with two issues: Whether Wisconsin Statute § 757.19 operated to disqualify Justice Geske and whether ES&G had received due process. Despite ES&G's feeble assertion in footnote 4 of its brief that the court "necessarily determined the federal question," there is no doubt the Wisconsin Supreme Court decided the case solely on the state issue. The Wisconsin Supreme Court cited only to Wisconsin state statutes and Wisconsin case law.[5] The Wisconsin Supreme Court never discussed, let alone decided, the federal issue. Nor was it necessary for the court to do so.

In *Aetna Life Insurance Company v. Lavoie*, cited by ES&G, this Court stated:

> [N]ot "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, *would seem generally to be matters merely of legislative discretion.*

475 U.S. 813, 820 (1986) (emphasis added). The Court, recognizing the trend was towards the adoption of statutes that permit disqualification for bias or prejudice, further stated:

> The Due Process Clause demarks only the outer boundaries of judicial disqualification.

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5. The only time the court referred to any federal authority is when it distinguished the authority cited by ES&G. (Pet. App. at 110 n.4).

> *Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here.*

Id. at 820, 828 (emphasis added).[6]

Following *Lavoie*, courts have frequently held that where the legislature has adopted a statutory disqualification standard more demanding than that required by the due process clause, the case may be decided on the statute alone. *See, e.g., In re International Business Machines Corp.*, 618 F.2d 923, 932 n.11 (2nd Cir. 1980) (declining to address due process issue finding disqualification statute more stringent and that "anything impinging on the constitutional right would have more readily violated § 144 and § 455"); *United States v. Haldeman*, 559 F.2d 31, 130 n. 276 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1976), *rehearing denied*, 433 U.S. 916 (1977) (same); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 503 F. Supp. 368, 382 (N.D. Ohio 1980) (failure to meet disqualification statute "*a fortiori*" defeats the due process allegation); *United States v. Conforte*, 457 F. Supp. 641, 659 n. 13 (D. Nev. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980) (defendant's constitutional claim summarily rejected in light of its failure to demonstrate disqualification under the statute since bias or prejudice would more readily violate the statute rather than due process).

Like the federal statute, Wisconsin Statute § 757.19 provides a more demanding standard than the due process clause requires.[7]

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6. At the time *Lavoie* was decided, Alabama did not have a disqualification statute addressing the issue. *See* Alabama Statute §12-1-12.

7. Disqualification under Wisconsin Statute § 757.19(2) may occur (Cont'd)

As a result, the Wisconsin Supreme Court's application of the state statute alone was "sufficient to conclude the case without regard to the determination . . . of the federal question." *Fox Film Corp.*, 296 U.S. at 210.

The Wisconsin Supreme Court decision was based on independent and adequate state grounds and there is no federal issue to be decided. Accordingly, this Court lacks jurisdiction to grant the petition.

II.

THE DUE PROCESS ISSUES PRESENTED BY ES&G DO NOT WARRANT SUPREME COURT REVIEW.

ES&G's motion involves the interpretation of a Wisconsin state statute.[8] It is well established federal courts are bound by state courts' interpretation and application of their own state statutes. *See, e.g., L.S. Heath & Son, Inc. v. AT&T Info. Sys. Inc.*, 9 F.3d 561, 574 (7th Cir. 1993); *In re Schlein*, 8 F.3d 745, 754 (11th Cir. 1993); *Johnson v. Fleet Finance, Inc.*, 4 F.3d 946, 947 (11th Cir. 1993); *Kifer v. Liberty Mut. Ins. Co.*, 777 F. 2d 1325, 1329 (8th Cir. 1985). However, even assuming, *arguendo*, this Court could review ES&G's constitutional challenge (despite the

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(Cont'd)
when the judge has a significant financial interest in the outcome of the case. Whereas disqualification under the due process clause, which only occurs in the "most extreme of cases," requires a showing that the judge has such a "direct, personal, significant and pecuniary" interest in the outcome of the case. *See Lavoie*, 475 U.S. at 821-22.

8. Even in its brief, ES&G argues there was a violation of Wisconsin Statute § 757.19 (Pet. at 6) and argues Justice Geske failed to meet the standards set forth in Wisconsin Statute § 757.19 (Pet. at 5-6).

jurisdictional defect and the fact that state law controls), this petition should still be denied because the due process issues raised by ES&G, in and of themselves, do not merit Supreme Court review.

Supreme Court Rule 10 specifies the character of reasons that are considered appropriate for the Supreme Court's discretionary review. None of them are applicable here. ES&G apparently agrees since, unlike its first petition for writ of certiorari, it does not even cite to Supreme Court Rule 10 or attempt to explain how the issues fall within the parameters of the rule.

A. The First Issue Presented By ES&G Is Not Relevant To Any Due Process Analysis And Is Not Supported By The Facts Of This Case.

The first issue presented by ES&G is whether the due process clause requires the recusal of a judge when the judge has a substantial pecuniary and personal interest in an *amicus curiae*.[9] This issue does not merit review for two reasons. First, the issue is irrelevant under the due process analysis employed by this Court because it does not matter *why* a judge may have an interest in the case; the issue is whether the judge *has* an interest in the outcome of the case. Second, ES&G misstates the facts underlying this issue.

The Supreme Court limits its review to special and important issues that have a far reaching impact. Supreme Court Rule 10.

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9. It should be noted that throughout its moving papers in the Wisconsin Supreme Court, ES&G complained "Justice Geske had a significant financial and personal interest in the *outcome of this appeal*." (emphasis added). At no time prior to this petition did ES&G distinguish between a judge's alleged interest in the outcome of the case and a judge's alleged interest in a particular item that caused the interest.

Here, the issue presented is irrelevant to the due process analysis employed by this Court. In analyzing whether due process requires disqualification, this Court has stated:

> [A] reasonable formulation of the issue is whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' "

Lavoie, 475 U.S. at 822 (*quoting Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972)). The Court further stated, due process considerations only arise when a judge has a "direct, personal, substantial, [and] pecuniary" interest in the outcome of the case. *Id.* at 824. Such an interest, the Court suggested, would only occur in the "most extreme of cases." *Id.* at 821.

Following the standard employed by this Court, it does not matter whether the interest is in a party, an *amicus curiae* or arises for some other reason. The inquiry is not what causes the interest but whether there is such a "direct, personal, substantial [and] pecuniary" interest which would "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." Thus, it is irrelevant as to *why* the interest may occur; this Court's analysis only focuses on whether there is (for whatever reason) an interest in the outcome of the case.

More important, this issue is not even properly before the Court because the facts underlying the issue are not present in this case. First, St. Paul was **not** an *amicus curiae* in the case. Second, Justice Geske did **not** have a direct, personal, substantial and pecuniary interest in either St. Paul or the outcome of the case.

Throughout its brief, ES&G blatantly exaggerates St. Paul's

role in this appeal.[10] St. Paul is not a party to this action. St. Paul is not even an *amicus curiae* as ES&G misrepresents. It is simply one of the many members of an organization that filed an *amicus* brief.

In addition, the accusation that Justice Geske had a direct, personal, substantial and pecuniary interest in this case is entirely devoid of any merit. ES&G's sole basis for accusing Justice Geske of having such an interest is, as ES&G claims, "her ownership of more than $50,000.00 in St. Paul stock and other securities in the St. Paul savings plan, her interest in the St. Paul retirement plan . . ." and her spouse's employment as a staff attorney at St. Paul. (Pet. at 13-14). ES&G mischaracterizes Justice Geske's "interest" in St. Paul and completely fails to explain how this alleged "interest" or her spouse's employment would create such a direct, personal, substantial, and pecuniary interest so as to make this one of the "most extreme of cases."

The St. Paul "interest" in question was disclosed by Justice Geske on her Wisconsin Ethics Board Disclosure form. As part of her disclosure, she listed the securities either she or her spouse own as including, among others, "Savings Plus Program from St. Paul Fire & Marine-St. Paul stocks and mutual funds." There is no evidence Justice Geske owned "more than $50,000" in St. Paul holdings since the "stocks and other securities" referred to by ES&G are really St. Paul stock *and* mutual funds.[11]

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10. ES&G has already been chastised by the Wisconsin Supreme Court for mischaracterizing St. Paul's role. (Pet. App. at 109) ("it must be noted that all of ES&G's arguments for disqualification hinge upon its persistent and unfounded assertion that St. Paul Companies is in essence a party to the action. It is not.").

11. Also contrary to ES&G's assertions, the entire investment appears to be part of a retirement plan. Many employers offer similar plans to their employees.

St. Paul's mutual funds are operated by the John Nuveen Company ("Nuveen"). Nuveen "specializes in the management of tax-free investments (*i.e.* bonds) for individual investors, and in the underwriting of municipal securities to institutional investors." (Best's Insurance Reports at 3038). There is no evidence Nuveen holds any St. Paul stock in any mutual fund in which Justice Geske may be invested. In short, there has been no showing that Justice Geske had any significant financial interest in St. Paul in the first place.

Moreover, there has been no showing that the outcome of the *City of Edgerton v. General Casualty Co. of Wisconsin* decision has had any effect whatsoever on the price of St. Paul stock.[12] The publicly traded company is "The St. Paul Companies, Inc." It is a diverse management holding company traded on the New York Stock Exchange and primarily engaged in property and casualty insurance, insurance brokerage, and the investment/banking asset management business. (Best's Insurance Reports at 3039). Only a small amount of St. Paul's net premiums and operating profits are generated through the type of policy at issue here. The Commercial Multiperil Line (which includes more than just the CGL policies) comprises less than 17.9% of the premiums written by St. Paul Insurance Group.[13] (Best's Insurance Reports at 3039). Of that 17.9%, less than 4.5% is written in Wisconsin. (1992 Wisconsin Insurance Commisioner's Report, hereinafter referred to as "Commissioner's Report"). In addition, St. Paul's business accounts for only 1.5% of all premiums written by carriers in Wisconsin with its medical malpractice line

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12. Notably, the day following the June 16, 1994 decision, the price of St. Paul's stock went down.

13. The St. Paul Insurance Group consists of 17 domestic property and casualty subsidiaries that underwrite medical malpractice, commercial lines, personal lines and reinsurance. (Best's Insurance Reports at 3038). They are wholly owned by the St. Paul Companies, Inc.

representing the largest percentage of St. Paul's overall net premiums and operating profits. (Commissioner's Report at 127; Best's Insurance Reports at 3039).

Contrary to ES&G's reckless assertions, an honest evaluation of Justice Geske's St. Paul "interest," together with the nature of St. Paul's involvement in this case and the structure of its business, demonstrates Justice Geske did not have a direct, personal, substantial and pecuniary interest in St. Paul. *See Department of Energy v. Brimmer,* 673 F.2d 1287, 1295 (Temp. Emer. Ct. App. 1982) (judge who owned stock in certain companies that participated in the Entitlement Program but did not own stock in any of the parties did not have a direct or personal financial interest and could hear the case without contravening due process).

Nor did Justice Geske have a direct, personal, substantial and pecuniary interest in this case as a result of her spouse's employment. At oral argument before the Wisconsin Supreme Court, Justice Geske disclosed her spouse, Michael J. Hogan, was an employee of St. Paul. Without support, ES&G claims Justice Geske had a direct, personal, substantial and pecuniary interest because her spouse is a "staff attorney" for St. Paul. There is nothing to indicate Justice Geske's spouse's employment would have been jeopardized if the case had been decided differently. Nor is there any evidence that her spouse's employment benefited from this decision. In light of the 100 or more reported cases in which St. Paul has actually been a party (as discussed in footnote 8 of ES&G's petition), it is highly unlikely any one case would have any impact on a St. Paul employee.

ES&G further alleges Justice Geske had a direct, personal, substantial and pecuniary interest by virtue of her spouse's employment because her spouse "represents St. Paul in insurance coverage litigation that determines whether St. Paul is liable for

defense and indemnification costs incurred by its insureds." (Pet. at 6). First, there is no evidence suggesting Justice Geske's spouse litigates insurance coverage issues. (ES&G's only authority on this point is its own brief filed in the Wisconsin Supreme Court which makes the same unsupported assertions). Second, even if there was evidence to support this contention, ES&G fails to explain why it is in any way relevant.

ES&G cannot simply rest upon a variety of unsupported allegations in an attempt to show a direct, personal, substantial and pecuniary interest. As *Lavoie* indicated, any interest must be real, direct and substantial. There is no evidence even remotely establishing such an interest in this case and ES&G's claim is utterly baseless. Because the facts underlying the issue are not present in this case and the issue itself is totally irrelevant to any due process analysis, certiorari is not warranted.

B. The "Voluntary, Knowing And Intelligent" Waiver Issue Was Not Raised In The Wisconsin Supreme Court And Otherwise Does Not Merit Review.

It is fundamental that ES&G's waiver issue does not even arise unless there are grounds for disqualification. Since there was no reason for disqualification in the first instance, there is no need for the Court to address the waiver issue.

Moreover, in its petition, ES&G, for the first time, raises the issue concerning whether there must be a "voluntary, knowing, and intelligent" waiver in disqualification cases. This issue was never presented to nor considered by the Wisconsin Supreme Court. Throughout its moving papers in the Wisconsin Supreme Court, ES&G argued "Justice Geske failed to fully and completely disclose her interest, and thereby failed to obtain a waiver for mandatory disqualification under Wisconsin Statute

§ 757.19(3)."[14] At no time prior to this petition has ES&G argued that the standard for waiver in this case is a "voluntary, knowing and intelligent" one. This Court has frequently held it is without jurisdiction when the issue had not been raised below. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of a state court decision"); *Doe v. Delaware*, 450 U.S. 382, 382 (1981), *reh'g denied*, 451 U.S. 964 (1981), *reh'g denied*, 458 U.S. 1117 (1982) ("appeal dismissed for want of a properly presented federal question"). Thus, this Court lacks jurisdiction to address this issue.

Even if this Court did have jurisdiction to grant certiorari on this issue, certiorari is not warranted. It simply does not matter which test should be utilized in this case since, even under the most stringent test advocated by ES&G, there is no doubt ES&G waived whatever objections it may have had to Justice Geske's participation in this case. ES&G now claims it did not voluntarily, knowingly or intelligently waive its rights because Justice Geske did not disclose: (1) her spouse was an attorney at St. Paul (she disclosed her spouse was employed by St. Paul); and (2) her spouse participated in the St. Paul Savings Plus program. Whether her spouse is an attorney, claims manager or a sales representative at St. Paul is irrelevant.[15]

Moreover, it is common knowledge many companies offer profit sharing plans which include their own stock. ES&G's apparent assumption that Justice Geske's spouse did not have

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14. Ironically, despite its contention that this case involves issues of due process, ES&G continues to make that same claim here. (Pet. at 5-7).

15. Nowhere in its petition did ES&G state that counsel representing ES&G did not know Mr. Hogan was employed by St. Paul as an attorney. It is well known in the Wisconsin legal community that Justice Geske's spouse is an attorney.

such a plan at such a large corporation as part and parcel of his employment reflects its stunning naivete about the workings of American corporations. Justice Geske's disclosure concerning her husband's status as an employee of a major corporation should have conveyed to the parties, including ES&G (who was represented by counsel and whose sole shareholder is an attorney) that Mr. Hogan received fringe benefits including a pension and profit sharing plan. ES&G can hardly contend it did not voluntarily, knowingly and intelligently waive any objection it may have had to Justice Geske's participation when it failed to raise the issue within one week of oral argument. *See Erie Telecommunications, Inc. v. City of Erie,* 853 F.2d 1084, 1096 (3rd Cir. 1988) (in analyzing this issue. the court should look to the sophistication of the party and whether the party is represented by counsel).

Even more remarkable is ES&G's contention a waiver did not occur when it failed to raise the issue at the time the K.A.T. Realty motion was filed. That motion, which was almost identical to the motion later brought by ES&G, provided all of the information upon which ES&G now bases its claim.

Although ES&G contends it can bring a motion to vacate at any time (Pet. at 10-11 n. 5), it is well understood a party must challenge a judge's ability to adjudicate a matter as soon as any alleged infirmity is known and prior to the judge's decision on a contested matter. *State v. Marhal,* 172 Wis. 2d 491, 505, 493 N.W. 2d 758 (Ct. App. 1992); *see also Taylor v. United States*, 179 F.2d 640, 642 (9th Cir. 1950). In *Taylor,* the court stated, "[a] defendant cannot take his chances with a judge and then, if he thinks that the sentence is too severe, secure a disqualification and a hearing before another judge." 179 F.2d at 642; *City of Cleveland,* 503 F. Supp. at 378-79 (purpose of requirement is to "prevent litigants from abusing motions to disqualify as dilatory tactics or as a means to 'sample the temper of the court' before deciding whether

to raise the issue of disqualification") (*see also,* cases cited therein). This is precisely what ES&G would like to do here.

As a result of Justice Geske's disclosure at oral argument, ES&G was well aware of the facts it claims supported this alleged conflict. It did not allege a conflict. After the decision was filed, ES&G filed for a motion for reconsideration. Again it did not allege a conflict. Even when three proposed *amici* raised an almost identical motion, ES&G failed to allege a conflict. It was not until the motion for reconsideration was denied that ES&G decided to challenge Justice Geske's ability to hear this case. The real motivation underlying this motion has nothing to do with Justice Geske's fairness or impartiality; it is simply to change the Wisconsin Supreme Court's decision. Sadly, this motion is nothing more than another litigation tactic. There is no reason to grant certiorari.

CONCLUSION

Based upon the foregoing, the petition for writ of certiorari should be denied.

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No. 94-1843

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Edgerton Sand & Gravel, Inc.,
Petitioner,

v.

General Casualty Company of Wisconsin
and Aetna Casualty and Surety Company,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Wisconsin

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Edgerton Sand & Gravel, Inc. submits the following reply to the brief in opposition filed by Respondents General Casualty Company of Wisconsin and Aetna Casualty & Surety Company (collectively, "Respondents").

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents argue that this Court lacks jurisdiction to grant the Petition for Writ of Certiorari because the Supreme Court of Wisconsin based its decision solely on state law. Respondents are mistaken. Petitioner preserved its right to raise the federal questions set forth in the Petition by asserting them below. That the Supreme Court of Wisconsin chose not to consider the federal questions in its decision does not deprive this Court of jurisdiction to address those federal questions. Moreover, the state rules enunciated in the decision below -- that recusal is not necessary when a judge has a substantial financial interest in an amicus curiae, and that a judge need not make a full disclosure of the basis for recusal when asking a party to waive its recusal rights -- fail to constitute an adequate and independent state ground that precludes Supreme Court review, since Due Process requires recusal under those circumstances.

In addition, Respondents assert that St. Paul Companies did not have an interest in the decision below -- an assertion that is contradicted by St. Paul's representation to the Supreme Court of Wisconsin that it was "vitally interested" in the outcome of this case. Also, Respondents argue that Wisconsin Supreme Court Justice Geske did not have a substantial financial interest in the St. Paul

Companies. But this argument finds no support in the record or in the decision below, and is belied by the fact that Justice Geske recused herself whenever St. Paul appeared as a party before the Supreme Court of Wisconsin.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO GRANT THIS PETITION

Respondents contend that the failure of the Supreme Court of Wisconsin to address Petitioner's Due Process arguments in the opinion below deprives this Court of jurisdiction to decide the Due Process question on a writ of certiorari. That contention is incorrect.

A federal question is preserved for Supreme Court review if the question has *either* been raised *or* been squarely considered and resolved in the state court. *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983); *see also Hill v. California*, 401 U.S. 797, 805 (1971) (what must be preserved is the state court's *opportunity* to review the constitutionality of the state's actions). Here, Petitioner presented the Due Process question below. Edgerton Br. 12-13. Thus, Petitioner preserved the question for Supreme Court review.

Lynch v. New York, 293 U.S. 52 (1934), cited by Respondents (Opp. at 8), is not to the contrary. That case held that "if it does not appear [from the record] upon which of two grounds [-- federal and state law --] the judgment [below] was based, *and* the [state law] ground is sufficient

in itself to sustain it, this Court will not take jurisdiction." *Id.* at 54 (emphasis added).

Respondents ignore the critical distinction between cases in which the lower court's disposition of the state law question rendered the federal question moot, and cases in which the disposition of the state law question did not resolve the federal question. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935), cited by Respondents (Opp. at 9-10), is an example of the former. In that case, the plaintiff had sued on a contract. The defendant had defended on the grounds that the contract was invalid on state law grounds, and on the ground that the contract was invalid under the Sherman Act.[1] The court below determined that the contract was invalid on state law grounds. Thus, there was no need to reach the federal question. Had this Court taken jurisdiction on the federal issue in *Fox Film*, the opinion rendered would have been purely advisory.

In contrast to *Lynch* and *Fox Film*, the decision below is not supported by an adequate and independent state ground. In the proceeding below, Petitioner argued that a justice has an obligation to recuse himself or herself if the justice has a substantial interest in an amicus curiae. Edgerton Br. 12-14. The Supreme Court of Wisconsin concluded that Wisconsin's recusal statute did not require

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[1] Specifically, the *state* law question in *Fox Film* was whether a portion of the contract that was *concededly invalid* under the Sherman Act was severable under state law from the rest of the contract. *Id.*

recusal if a justice has an interest in an amicus curiae (App. 109) -- even where, as here, the amicus curiae represented that it was "vitally interested" in the outcome of the case. The court held further that a justice is not required to make a full disclosure of the basis for a recusal request when the justice asks a party in a case before that court to waive recusal rights. App. 109-10.

The federal recusal cases upon which Respondents rely (Opp. at 11) do not support Respondent's contention that the Wisconsin recusal statute is an independent and adequate state ground for denying Petitioner's motion to recuse. In those cases, the courts *determined*, albeit sometimes with little discussion, that the requirements of a state recusal statute were greater than the requirements of Due Process, and thus *determined* that Due Process had not been violated. Those cases are far from holding that the Due Process issue was moot; on the contrary, they reached the Due Process question and concluded that Due Process was satisfied.

Respondent's argument begins from the *premise* that the Wisconsin recusal statute, as interpreted below, is more restrictive than the requirements of Due Process. Whether that premise is correct is precisely the issue that Petitioner has asked this Court to decide. It is of course true, as Respondent states, that the Wisconsin Supreme Court has the final say as to whether Justice Geske's failure to recuse herself violated Wisconsin law. Opp. at 12. By the same token, however, *this* Court determines independently whether such refusal violated petitioner's Due Process rights. *See, e.g., Ward v. Village of Monroeville*, 409 U.S. 57, 59

(1972) (reversing the determination of the Supreme Court of Ohio that a mayor/judge's impartiality was not diminished by his interest, as overseer of the village finances, in a $100 fine); *Brookhart v. Janis*, 384 U.S. 1, 4 n.4 (1966) ("When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record."). Thus, merely because Justice Geske's conduct passes muster under the Wisconsin recusal statute does not determine whether the Due Process Clause requires recusal.

II. THIS PETITION PRESENTS A DUE PROCESS QUESTION

Respondents assert next that the initial issue presented in this Petition -- whether Due Process requires recusal of a state supreme court justice who has a substantial interest in an *amicus curiae* that is vitally interested in the outcome of a case before the state supreme court -- in fact is a non-issue. Respondents suggest that this Court's precedent requires recusal of a judge in any situation "'which would offer a possible temptation to the average judge to . . . lead him not to hold the balance nice, clear and true,'" Opp. 14, quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986), including cases in which an *amicus curiae* is the entity that offers the temptation to the judge to abandon that balance.

Petitioner agrees -- indeed, that is the basis for its Petition for Writ of Certiorari. But the Supreme Court of Wisconsin disagrees. It held that a state supreme court justice has no recusal obligation unless the justice has a

substantial financial interest in a party. App. 109. An interest in an *amicus curiae*, that court stated, is not enough. *Id.* As is discussed more fully in the Petition, this Court should grant the Writ of Certiorari to decide whether the Supreme Court of Wisconsin's view is right.

Respondents assert further that St. Paul was not an *amicus curiae* in the Wisconsin Supreme Court proceeding. Opp. 14-15. That is incorrect. The *amicus* brief that the Insurance Environmental Litigation Associate filed states expressly that it was filed "on behalf of . . . St. Paul . . . ." ILEA Mtn. 2 n.2.

In addition, Respondents contend that St. Paul did not have the requisite interest in the outcome of the proceeding below. But St. Paul's own words contradict this contention. St. Paul told the Supreme Court of Wisconsin that it had a "substantial, independent interest[] in the questions presented" and was "vitally interested" in the proceeding below. *Id.* at 3-4.[2]

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[2] In support of their argument, Respondents point to various statistics concerning the premiums that St. Paul received in the 1990s for the coverage that it currently writes in Wisconsin. Opp. 16-17. But St. Paul's interest in the interpretation of liability insurance policy provisions relating to insurance coverage for environmental cleanup costs does not depend on its current coverage, since virtually every insurance policy written since 1985 has an absolute exclusion for pollution claims. *See generally Hartford Fire Ins. Co. v. California*, 509 U.S. ___ (1993). Rather, what matters are

Respondents also suggest that Justice Geske did not have a substantial interest in St. Paul. But Respondents ignore that Justice Geske recused herself in the two cases before the Wisconsin Supreme Court in which St. Paul was a party. *See* Petition at 14. Respondents likewise ignore Justice Geske's holdings in the St. Paul Savings Plan (which include St. Paul stock),[3] Justice Geske's interest in the St. Paul retirement plan,[4] and the employment by St. Paul of Justice's Geske's husband, attorney Michael Hogan. This financial and personal stake is amply sufficient to support a Due Process claim. *See, e.g., Ward, supra*, 409 U.S. at 60-61 (even though the mayor/judge did not directly share in

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the claims that St. Paul might be required to pay pursuant to the insurance that it wrote prior to 1985, when it provided pollution coverage. As to that issue, the Petition notes (at 15 & n.9) that St. Paul faces a substantial number of claims for insurance coverage for environmental cleanup costs, in Wisconsin and elsewhere.

[3] Respondents state that there is no evidence that Justice Geske held St. Paul stock. Opp. 15-16. As the opinion below reflects, however, that is incorrect. Justice Geske's financial disclosure statement, which is written in her own hand, states that her holdings consist, *inter alia*, of "St. Paul stocks and mutual funds." App. 109; Edgerton Br., Addendum B.

[4] That businesses commonly offer retirement plans, Opp. 15 & n.11, is beside the point. The St. Paul retirement plan benefits Justice Geske, who cast the deciding vote in a case in which St. Paul was "vitally interested."

petitioners' $100 fine, Due Process was violated because the fine went into the village coffers and the mayor/judge oversaw village finances).

Finally, Respondents argue that Due Process does not mandate recusal of a judge unless the judge actually receives a financial or personal benefit from the decision that the judge makes. Opp. 16-17. Here, Respondents point to the absence of evidence that Justice Geske's husband and St. Paul actually benefited from the decision below. *Id.* Respondents misstate the standard. Recusal is required when a judge faces a "'possible temptation'" to decide in favor of one of the parties, *Lavoie*, 475 U.S. at 822, not when the judge, or the entity in which the judge is interested, actually benefits from the decision. *See, e.g., Ward, supra*, 409 U.S. at 60-61.

III. THIS PETITION PRESENTS A WAIVER OF DUE PROCESS QUESTION

Respondents contend that Petitioner cannot present the question of waiver to this Court, because it never raised below the argument that no "voluntary, knowing, and intelligent" waiver had taken place. Respondents are mistaken. Petitioner asserted below that it was entitled to challenge Justice Geske's participation in the case and noted that Justice Geske did not make full disclosure to them. Edgerton Br. 9-11, 13-14. That Petitioner did not specifically use the words "voluntary, knowing and intelligent" in connection in its pleadings below is beside the point. It is sufficient that Petitioner contended that its Due Process rights were violated by Justice Geske's failure to

recuse herself without full disclosure. *Illinois v. Gates, supra,* 462 U.S. at 219-20 (parties before Supreme Court are not confined here to the same arguments which were advanced in the courts below upon a federal question).

Respondents also complain that Petitioner delayed in seeking recusal of Justice Geske. But Justice Geske's interest in the outcome of this appeal was not brought to Petitioner's attention until after the Supreme Court of Wisconsin issued its decision on the merits and a motion for reconsideration of that decision was pending. Petition at 7 n.3. Thus, this was not a case in which a party, knowing of grounds for recusal, delayed seeking such recusal in order to "sample the temper of the court." *See* Opp. at 20. That Petitioner waited slightly longer until after the denial of the motion for reconsideration before asking Justice Geske to recuse herself not only was prudent, but was a way of conserving judicial resources. In any event, the Supreme Court of Wisconsin held that it could reach the merits of the recusal motion notwithstanding the delay. *See* Petition at 9-10 & n.5.

Finally, Respondents assert that once Justice Geske disclosed that her husband was an employee of St. Paul, Petitioner had a duty to investigate to determine the extent of her interest in St. Paul. But that is the very issue that the Petition raises -- whether a justice seeking a waiver of a recusal obligation must make a full disclosure of the basis for recusal, so that the waiver is "voluntary, knowing and intelligent," or whether a partial disclosure will suffice. As is discussed in the Petition (at 17-20), prior decisions of this

Court strongly suggest that the former standard applies, but this Court has not yet squarely addressed the issue.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

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